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Ohio Courts of Appeals Reports.

(Cited O. C. A.)

Volume XXIX.

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in the

Courts of Appeals of Ohio.

VINTON R. SHEPARD, Editor.

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SEP 2 1919

Judges of the Courts of Appeals of Ohio.

HON. SILAS S. RICHARDS, *Chief Justice*, Clyde, Ohio.
ALBERT H. KUNKLE, *Secretary*, Springfield, Ohio.

FIRST DISTRICT.

Counties—Butler, Clermont, Clinton, Hamilton and Warren.

WALTER M. SHOHL Cincinnati
FRANCIS M. HAMILTON Lebanon
WADE CUSHING Cincinnati

SECOND DISTRICT.

*Counties—Champaign, Clark, Darke, Fayette, Franklin, Greene,
Madison, Miami, Montgomery, Preble and Shelby.*

JAMES I. ALLREAD Columbus
H. L. FERNEDING Dayton
ALBERT H. KUNKLE Springfield

THIRD DISTRICT.

*Counties—Allen, Auglaize, Crawford, Defiance, Hancock, Hardin,
Henry, Logan, Marion, Mercer, Paulding, Putnam, Seneca,
Union, Van Wert and Wyandot.*

WALTER H. KINDER Findlay
PHILIP M. CROW Kenton
KENT W. HUGHES Lima

FOURTH DISTRICT.

*Counties—Adams, Athens, Brown, Gallia, Highland, Hocking, Jackson,
Lawrence, Meigs, Pickaway, Pike, Ross, Scioto,
Vinton and Washington.*

FESTUS WALTERS Circleville
EDWIN D. SAYRE Athens
WM. H. MIDDLETON Waverly

FIFTH DISTRICT.

*Counties—Ashland, Coshocton, Delaware, Fairfield, Holmes, Knox,
Licking, Morgan, Morrow, Muskingum, Perry, Richland,
Stark, Tuscarawas and Wayne.*

LEWIS B. HOUCKMt. Vernon
ROBERT S. SHIELDSCanton
FRANK N. PATTERSONAshland

SIXTH DISTRICT.

*Counties—Erie, Fulton, Huron, Lucas, Ottawa, Sandusky,
Williams and Wood.*

REYNOLDS R. KINKADEToledo
SILAS S. RICHARDSClyde
CHARLES E. CHITTENDENToledo

SEVENTH DISTRICT.

*Counties—Ashtabula, Belmont, Carroll, Columbiana, Geauga, Guernsey,
Harrison, Jefferson, Lake, Mahoning, Monroe,
Noble, Portage and Trumbull.*

WILLIS S. METCALFEChardon
L. T. FARELisbon
JOHN POLLOCKSt. Clairsville

EIGHTH DISTRICT.

Counties—Cuyahoga, Lorain, Medina and Summit.

THOS. S. DUNLAPCleveland
C. G. WASHBURNElyria
WILLIS VICKERYCleveland

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Volume XXIX.

CAUSES ARGUED AND DETERMINED IN THE COURTS OF
APPEALS OF OHIO.

RECOVERY BY DEPENDENTS OF AN INJURED WORKMAN WHO COMMITTED SUICIDE.

Court of Appeals for Cuyahoga County.

THE INDUSTRIAL COMMISSION OF OHIO V. KATE P. BOYD.

Decided, June 17, 1918.

Workmen's Compensation—Death Not "Self Inflicted"—Where an Inference of Insanity is Supported by Some Evidence—Freedom from Technical Rules in Such an Inquiry.

Judgment against the Industrial Commission in favor of the dependents of an injured workman, who died by his own act, will not be set aside where there is some evidence tending to establish the inference that the decedent was bereft of reason at the time of the suicidal act.

Samuel Doerfler, for plaintiff in error.

Payer, Winch, Rogers & Karch, contra.

GRANT, J.

Error to the court of common pleas.

It has been intimated that the function of this court in this case is likely to be propaedeutical to the Supreme Court.

But be that as it may, it is not the less our duty to examine this record with as much painstakingness as if here was to be an end of the litigation.

The statute under which the plaintiff below—defendant here—must recover, if at all is Section 1465-68, General Code, in its present amended form, and which reads as follows:

“Every employee mentioned in subdivision one of section fourteen hereof who is injured, and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, on or after January 1, 1914, shall be paid such compensation out of the state insurance fund for loss sustained on account of such injury or death.” * * *

In this case a claimed result or sequence of the employee's injuries was his insanity. While thus bereft of reason he committed suicide.

The question then is, was his death “purposely” self-inflicted? If it was, there should be no recovery.

A judgment for the plaintiff was had in the court below. We are asked to reverse it, because, it is said, the injury otherwise called death was self-inflicted.

What seems to be the accepted text-book rule on the subject, is laid down in Honnold on Workmen's Compensation, Vol. 2, page 508, thus:

“Where there follows as the direct result of a physical injury an insanity such as to cause the workman to take his own life through an unaccountable impulse or in a delirium of frenzy without conscious volition to produce death, having knowledge of the physical consequences of the act, there is a direct and unbroken connection between the injury and the death. But where the resulting insanity is such as to cause suicide through a voluntary willful choice determined by a moderately intelligent mental power which knows the purpose and the physical effect of the suicidal act, even though choice is dominated by a

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disordered mind, then there is a new and independent agency, which breaks the chain of causation arising from the injury."

The contention of the Industrial Commission at this point, stated in terms of its brief, is as follows:

"There is no evidence which would in any way tend to prove that Mr. Boyd committed suicide by reason of 'an unaccountable impulse or in a delirium of frenzy.'"

The proof on such a question must of necessity generally be meager in amount and more or less speculative in outcome. Inference must arise, if at all, from a distorted viewpoint on the part of the suicide and the workings of an insane man's mind are so curious, so complex, having their springs and sources often in a remote and almost undiscoverable concatenation of happenings, that to trace the outcome satisfactorily, or to any approximate degree of certainty, is difficult at all times and at many times impossible. Witness Mr. Lorry in the "Tale of Two Cities." An insane person—so common experience shows—is prone to destroy himself. The impelling force to the act he seems to have no power to resist, and yet he often seems, even when so controlled, to be cunning and calculating in his concealment of his enforced yielding to the impulse of self-destruction, to a degree that a conclusion is often drawn that the ingredient of premeditation, a fixed and thought-out purpose, an intent, is present, which would to appearance exclude the notion of an involuntary taking of his life through an uncontrollable and overpowering force outside of himself and beyond all volition of his.

Still, courts must act upon evidence, and not speculation. They may, however, recognize in their case in hand experienced truths of conduct and action, known to operate on mankind and to govern human action, within appropriate limits and landmarks fixed by universal observation. One of these truths is, we think, this almost invariable propensity in an insane person to do away with himself, without power to resist it.

Evidence from the witness stand must be in conflict, because it must rest largely in opinion, in deduction, in inference. It

appears to have been in conflict in this case. We can not agree that there was "no evidence which would in any way tend to prove that Mr. Boyd committed suicide by reason of an unaccountable impulse or in a delirium of frenzy," as the brief says.

That different minds would reach different conclusions as to the tendency of the evidence in this respect, is true, probably—perhaps certainly. Our own conclusion in this regard might be different—although we do not say so—from that of the court below. But if it were so, the fact would not warrant a reversal here. The fact that minds would differ in conclusion, of itself commands repose for the judgment, if there was anything in the evidence about which they might fairly differ. We think there was something in this case.

We are not at liberty in any event to disregard this rule of non-intervention by a reviewing court, whenever it appears that the conflict in the evidence is a real one, in resolving which men may honestly vary in conclusion, it being the business of the court of first instance to say where the preponderancy resides. We ought to be especially loath to disturb a judgment rendered in promotion of a statute the purpose of which is highly remedial, and where the policy underlying its administration is avowedly liberal in favor of the remedy, whenever the facts warrant its application.

The act which created the former board of awards—the predecessor in function of the plaintiff in error, declared as follows:

"Such board shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided; but may make the investigation in such manner as in their judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act."

We are not by this relieved of the duty of declaring the law of the case; but we are admonished that the plain legislative wish is not to have the law administered in any grudging or cheese-paring fashion.

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In our opinion there is some evidence in the case, the tendency of which is to establish the inference which is embodied in the judgment under review. It is, therefore, affirmed.

DUNLAP, J., and LAWRENCE, J., concur.

**INDIVIDUAL CONTRACT RELIEVING RAILWAY COMPANY
FROM DAMAGES.**

Court of Appeals for Columbiana County.

**THE NEWELL BRIDGE & RAILWAY CO. v. THE EAST
LIVERPOOL TRACTION & LIGHT CO.**

Decided, December 20, 1916.

*Negligence—Railway Company Can Not by Contract—Relieve Itself
from Liability for Its Own Negligence—Street Car Tracks Used
by Two Companies—Liability for Injuries.*

The plaintiff and defendant are both street railroad companies. By contract the plaintiff has the right to use certain portions of the tracks of the defendant. A clause in said contract relieves the defendant from any responsibility for loss or damage occasioned by the operation of plaintiff's cars over its tracks. By the negligence of the defendant a car of the plaintiff was thrown from the track, injuring several persons. The defendant requested the plaintiff to settle with the injured persons and leave the question of defendant's liability to be determined later. The plaintiff having settled with the injured persons brought suit against the defendant to recover the amounts paid in such settlement. *Held:*

1. The clause in the contract relieving the defendant from responsibility from loss or damage occasioned by the operating of plaintiff's cars does not relieve the defendant from responsibility to the plaintiff for damages occasioned by defendant's own negligence.
2. The plaintiff is entitled to recover the amount paid in settlement of damages to the injured persons.
3. An action to recover the damages thus occasioned is not a suit between joint trespassers, but an original action to recover damages sustained by the plaintiff through the sole negligence of the defendant.

Walter Hill and Brookes & Thompson, for plaintiff in error.
Billingsley, Moore & Van Fossen, contra.

METCALFE, J.

The only questions in this case before the court at this time are raised by the demurrer to the answer. The plaintiff operates a line of street railway from Newell, West Virginia, across the Ohio river to the city of East Liverpool, Ohio, and in the latter city runs its cars over a portion of the tracks of the defendant company. The right to so operate its cars on the defendant's tracks is secured by contract, and it is the duty of the defendant to keep its tracks in repair.

On one of the streets in East Liverpool, over which the plaintiff ran its cars, was a switch which was out of repair. The plaintiff had several times notified the defendant of the condition of the switch and requested of defendant that the necessary repairs be made thereon.

At the time of the accident complained of in the petition the plaintiff had occasion to run one of its cars over this switch. The front truck passed over in safety, but when the rear truck struck the switch it opened and threw the rear end of the car off the track it was running on and on to a track leading on to another street, so that the car was thrown squarely across the street on which it was running.

A number of persons at work on the street at the time were injured. The defendant denied its liability, but it was agreed between the plaintiff and defendant that the plaintiff should settle with the injured persons and that the question of defendant's liability should be determined later. Thereupon, the plaintiff settled with the injured persons and brought this suit to recover the amounts paid in such settlement.

The defendant claims exemption from liability to the plaintiff by reason of the following clause in the contract by which plaintiff secured its right to run its cars over defendant's tracks:

"To use all due precaution for the safety of the public, and in consideration of the rights herein granted to save and hold the first party (defendant) free and harmless from all loss, cost,

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damage, and expense whatsoever, which may in any wise accrue through, or be incurred by said first party (defendant) by reason of the operation by the second party (plaintiff) of his cars over the tracks of said first party as herein provided."

The object of this clause in the contract is to secure indemnity to the defendant from liability for any acts of negligence on the part of the plaintiff in operating its cars while on the defendant's tracks. The contract saves the defendant harmless from any acts of the plaintiff in the operation of its cars which would create a liability, whether such acts be negligent or not. There is nothing in the contract which in any way relieves the defendant from the consequences of its own negligence.

The car of the plaintiff was in operation at the time of the accident, but the accident was not occasioned through any fault of the plaintiff in operating the car, but by the negligence of the defendant in failing to keep the switch in repair. It happened solely on account of the fault of the defendant. It is not from its own negligence that the defendant is relieved by the terms of the contract, but from the negligence of the plaintiff.

In *Eugene C. Lewis Co. v. Metropolitan Realty Co.*, 112 App. Div., 385, 98 N. Y. Supp., 391, affirmed 189 N. Y., 534, it is held that a provision in a lease relieving the lessor from any liability for any loss or damage by reason of leakage of gas, steam or water pipes, did not relieve him from liability for an overflow of a water tank as the result of the lessor's own negligence. And to the same effect, also, are *Levin v. Habicht*, 90 N. Y. Supp., 349; *LeVette v. Hardman Estate*, 77 Wash., 320, 137 Pac. Rep., 454; *Smith v. Faxon*, 156 Mass., 589, 31 N. E. Rep., 687.

It is urged, too, that the plaintiff and defendant were joint trespassers and that this is an action between joint trespassers for contribution.

Doubtless the plaintiff and defendant would be jointly liable to the injured persons, but this is not an action for contribution as we view it. The action is to recover for injuries to the plaintiff by reason of the sole negligence of the defendant.

The injury having occurred by reason of the defendant's negligence, the fact that the plaintiff would be jointly liable

with the defendant to the injured persons does not make the plaintiff a joint trespasser.

We think the court erred in overruling the demurrer to the answer, and the judgment is reversed.

POLLOCK, J., and SPENCE, J., concur.

PASSENGERS STRUCK BY A CAR ON PARALLEL TRACK.

Court of Appeals for Mahoning County.

THE MAHONING VALLEY RAILWAY CO. v. KAZANECKA.

Decided, March 23, 1917.

Negligence—Duty of Interurban Railway Toward Passengers Crossing Its Parallel Track Upon Leaving a Car on Its Own Right-Of-Way—Degree of Care Required from Alighting Passenger—Charge of Court.

1. Where a car is standing at a regular stop on the right-of-way of the company for the purpose of receiving and discharging passengers, it is the duty of a motorman operating a car on the parallel track going in the opposite direction, while passing such standing car, to keep his car under such control that it may be stopped on the instant, and failure so to operate it is negligence.
2. While a passenger alighting from such standing car is not relieved from the duty of using ordinary care, such ordinary care does not require him to anticipate negligence. Failure on his part to look and listen for a car on the parallel track while passing behind the standing car for the purpose of crossing such parallel track, in order to get off of the premises of the company, is not contributory negligence on his part.

Arrel, Wilson, Harrington & DeFord, for plaintiff in error.
Anderson & Lamb, contra.

METCALFE, J.

This action was brought by the plaintiff below to recover for damages which she claimed to have sustained through the negligence of the defendant company.

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Anna Kazanecka was a passenger on one of the company's cars going from Youngstown, Ohio, to Newcastle, Pa. The place where she stopped was a regular stopping place of the company's cars and was on the company's right-of-way, and was not at a street crossing. Many passengers alighting at this point were accustomed to cross the tracks of the company to reach the public street, while others would pass along the right-of-way parallel with the track to another street.

Miss Kazanecka alighted from the car, and, while it was still standing on the track, passed behind it, intending to cross the parallel track and continue on across the right-of-way to the street. As she was about to step upon the parallel track she was struck by a car going in the opposite direction from the one from which she alighted. She recovered a verdict in the court of common pleas, and it is claimed that the court below committed error prejudicial to defendant, the present plaintiff in error.

The first exception taken is to the giving of plaintiff's request to charge, No. 1, which is as follows:

"The employees of the defendant knew that at stop seven there was a double track; that the steam railway tracks were close to and upon one side of their tracks, and at least the majority of the passengers leaving said car would go across both tracks of the defendant company. Therefore, it was the duty of the company to keep in mind the rights of its patrons who were under a necessity of crossing the tracks in going from the car to their home or elsewhere."

This request puts upon the defendant company, while its car discharging passengers is standing, the duty of keeping in mind the rights of its passengers after leaving the car, and of being regardful of their safety while crossing the tracks of the company when a car going in the opposite direction is passing.

Request No. 7 on the part of the defendant was refused. This request is as follows:

"The conductor of the east bound car was under no duty to warn plaintiff that cars were approaching or likely to approach from the opposite direction on the west bound track, and he was

not negligent in failing to advise her of this fact either while she was alighting from the car or after she had alighted therefrom, and if you find that he called out a warning to her at the earliest moment when he discovered that she was going into a zone of danger upon or near the west bound track, he fulfilled his duty towards her in that situation."

This raises the question squarely whether or not any duty rests upon the company or its employees to be regardful of the safety of passengers after they have left a car, but are still upon the premises of the company.

Request No. 8 of the defendant was also refused. It is as follows:

"The court says to you, as a matter of law, that this defendant company was not obliged to stop a west bound car before passing the east bound car, but that it had a right to operate its west bound car by and past the standing east bound car while said east bound car was standing at Stop 7."

It is urged on the part of the plaintiff in error, the stop in question being outside of the limits of a municipal corporation, that the duty of the employees of the company ceased when a passenger alighted, unless the company was aware of some danger, and that in such case the company would discharge its duty by giving him warning.

Whether the propositions contained in the last two requests and urged upon us in argument are true or not, when applied to a case of a car being operated on the public highway, we do not say, but we do not think they can apply in the case of a car being operated on the company's right-of-way, as in this case. The stop where the plaintiff alighted was on the premises of the company. It was not at a crossing at a public street. Alighting passengers were accustomed to cross the tracks to get off of the premises of the company.

We do not say that an absolute duty rested upon the company to stop the car going in the opposite direction when approaching a car from which passengers were alighting. We do say, however, that it was the duty of the company's employees in

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charge of the car, if they did attempt at such a time to run past on the parallel track, to have the car under such control that it could be stopped at a moment's warning. Of course passengers would not be excused from the duty of using ordinary care, but ordinary care does not require them to anticipate negligence on the part of the company, and it is negligence to so operate a car in such a situation as to endanger the passengers who are leaving the standing car. A passenger has a right to cross the tracks of the company at such a time without anticipating any danger at the hands of the company's servants, and the failure of such passenger to look and listen for the approach of a passing car would not be contributory negligence on his part. If the company undertakes to operate a car past another car, at a place on its own premises where the latter is discharging passengers, it does so at its own peril and not at the peril of the passengers.

In this position we feel that we are fully sustained by the authorities. The proposition is thus well stated in 3 Thompson on Negligence (2d Ed.), Section 2705:

"If a railway carrier discharges its passengers at a place where they have to cross other railway tracks, in order to make their egress from the grounds of the carrier, the carrier owes them the duty of taking reasonable precautions to the end that, while making their egress, they be not struck by other passing trains; and it has been justly held that the passenger, while not absolved from the duty of exercising care for his own safety, has the *right to presume* that the tracks intervening between the the places where he is obliged to alight and the station will be kept safe while he is crossing; so that the mere fact that he fails to look and listen for an approaching train before attempting to cross, will not necessarily be ascribed to his contributory negligence, and will not prevent a recovery of damages if he is struck by such a train."

The above proposition is fully sustained by the authorities in the case of electric as well as steam railways. *Bremer v. St. Paul City Ry. Co.*, 107 Minn., 326, 120 N. W. Rep., 382, 21 L. R. A., N. S., 887; *Birmingham Ry., L. & P. Co. v. Landrum*, 153 Ala., 192, 45 So. Rep., 198; *VanNatta v. People's St. Ry., Elec.*

L. & P. Co., 133 Mo., 13, 34 So. Rep., 505; *Evansville St. Ry. Co. v. Gentry, Admr.*, 147 Ind., 408, 37 L. R. A., 378; *Consolidated Traction Co. v. Scott, Admx.*, 58 N. J. L., 682; *Dobert, Admr., v. Troy City Rd. Co.*, 36 N. Y. Supp., 105; *Capital Traction Co. v. Lusby*, 12 App. D. C., 295, and *Cincinnati St. Ry. Co. v. Snell*, 54 Ohio St., 197.

Complaint is made of the following charge given on behalf of the plaintiff:

"If the testimony of plaintiff and her witnesses does not raise a presumption of contributory negligence on her part, then the burden rests upon the defendant company to prove that in the situation not only that she was guilty of contributory negligence, but that such contributory negligence directly and proximately contributed to produce her injury, and if the defendant had thus failed to prove contributory negligence, it is your duty to find that the plaintiff was not guilty of contributory negligence."

It is urged that this charge is wrong for the reason that if the testimony of the plaintiff, and the witnesses introduced on her behalf, raised a presumption of negligence, then it was her duty to remove that presumption by a preponderance of the evidence.

It is true that that is the law, but is it the duty of the trial judge to give it to the jury in that way, under all circumstances; or is it error to give a charge which does not state that it was the duty to remove the presumption by a preponderance of the evidence where the proposition given is sound law and applicable to the case? The law as stated in this charge is correct and is applicable to the case. It is true it is usually given with the qualifying words, "that if the evidence of the plaintiff created a presumption of contributory negligence, then the duty rests upon the plaintiff to remove that presumption," but we do not think that the omission of those words from a request to charge is prejudicial error. Besides, the contributory negligence complained of was a failure to look and listen for the approaching car, but the jury found that plaintiff did look and listen, and we have announced it to be the law in this case that a failure

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on her part to look and listen for an approaching car on the other track would not be contributory negligence on her part, so we think that in either event there was no error in giving the charge.

POLLOCK, J., and FARR, J., concur.

**JURISDICTION TO COMPEL TRIAL JUDGE TO SIGN
BILL OF EXCEPTIONS.**

Court of Appeals for Cuyahoga County.

STATE, EX REL JOHN GILL & SONS CO., v. GEORGE P. BAER, JUDGE.

Decided, December 24, 1917.

Mandamus—Determination as to Whether a Bill of Exceptions is True, Vested in the Trial Judge—Can Not be Compelled to Sign a Bill He Has Found to be Untrue.

The judge who sat at the trial is under no obligation to prepare a bill of exceptions, his sole duty being to determine whether the bill submitted is a true bill and if he so finds to sign and seal it as provided by law; and this rule is not affected by the fact that there was no stenographic report taken of the evidence and there has been a change of counsel since the trial occurred and it is impossible to procure all of the testimony from the memory of counsel.

*Hoyt, Dustin, Kelley, McKeehan & Andrews, for plaintiff.
George Spooner and Samuel Horwitz, contra.*

CARPENTER, J.

The relator alleges that he had duly presented to the trial judge a "true" bill of exceptions of all the evidence produced at the trial in the case of the *John Gill & Sons Co. v. J. Ablisky*, at which trial the said Hon. George P. Baer presided, and asked him to correct the same, if necessary, and to allow and sign such bill, as provided in Section 11566, G. C.; that said defend-

ant refused arbitrarily and unjustly and for the sole purpose of defeating relator's right to proceed in error in said cause, to settle, allow or correct and sign said "true" bill of exceptions, etc. An alternative writ was allowed to issue.

The defendant in his answer says in substance that the trial consumed two full days during which time much testimony was required and that he advised counsel then to secure a stenographer so that a record might be made, but that said counsel did not so do; that the relator, after the rendition of the verdict, changed counsel; that the said bill of exceptions which said counsel had so prepared and presented to him for signature was not a "true" bill and did not and does not truthfully set forth the testimony nor evidence; that it does not properly or fully report, even in substance, the testimony of the witnesses at said trial; that it charges and accredits testimony to the defendant that was obtained from relator's superintendent on cross-examination, does not give the charge of the court correctly or fairly, and untruthfully states that said bill contains "all the evidence offered and given at said trial."

Defendant further alleges that all the matters regarding said bill of exceptions were fully presented to him at a hearing at which both plaintiff's and defendant's counsel were present and arguments made, at which hearing the court held that the bill presented to him was not a "true" bill of the testimony nor evidence in said case; that then and there he offered to help relator's counsel to prepare a suitable bill to raise any questions of law involved in the trial and now offers to sign any "true" bill that is presented.

In the argument of counsel at the hearing it was substantially admitted that the bill did not contain "all the evidence" and that it was not a "true" bill. Excuse was made that by reason of change of counsel and the circumstances connected therewith that it was impossible to procure from the memory of counsel who was present and conducted the trial all of the evidence and charge of court, the intimation being that the court should furnish from his memory such evidence and charge and prepare for relators an entire and true bill.

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That a judge who has presided at a trial is not required by law to prepare a bill of exceptions for counsel, and that he is only obligated to sign a "true" bill, and when the adverse party files an objection or amendment to correct the same, is fully established in the case of *State v. Todd*, 4 Ohio, 351. As said by the court:

"The bill of exceptions, is in practice, and by law, to be signed and sealed only, not to be prepared by judges; the only obligation upon the judge, is to sign and seal a true bill of exceptions. But the object of the relator is not to compel the judges to sign a correct bill of exceptions, but to sign the bill offered by relator. * * * The power of determining whether a bill of exceptions is true, or not, is vested in the judges to whom it is presented for signature. * * * If the court had granted a rule to sign a bill of exceptions, the judge could have returned that he had performed that duty. But the object of the rule is to oblige the judge to sign a particular bill of exceptions, which had been offered to him. The court granted the rule to show cause, and the judge has shown cause, by saying that he has done all that can be required of him, and that the bill is not such a one as he can sign. Nothing is more manifest, than that the court can not order him to sign such a bill of exceptions." See *Ex parte Bradstreet*, 29 U. S. (4 Pet.), 105, 106.

It will be remembered that in the present case the court refused to sign the bill of exceptions because it was not a "true" bill; that he had suggested to counsel to have the testimony taken down as given; that thereafter he offered his assistance in preparing a correct bill and that he offers to sign any "true" bill that is presented to him; but it is insisted upon by counsel that he sign the particular bill presented to him.

In the case of *Creager v. Meeker*, 22 Ohio St., 207, it is said in the syllabus that:

"An application for a mandamus to compel a judge to sign a bill of exceptions, should be accompanied by the bill that was tendered to him for his allowance. Where the answer in such case shows that the defendant is willing to sign a true bill, but denies that the bill presented is true, the writ must be refused, as the right to determine as to the truth of a bill of exceptions is vested in the judge to whom it is presented."

State, ex rel, v. Baer, Judge.

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And in the case of *Shephard v. Payton*, 12 Kans., 616, the syllabus is:

“That the decision of the trial judge that a bill of exceptions tendered to him for signature is untrue is conclusive and final and the Supreme Court will not, upon mandamus, hear testimony, or compel him to sign it.”

The court has judicially decided that the bill which was presented to him was not a true bill, and under the authorities above cited the court was acting within its proper jurisdiction. It being conceded that the bill was not a true bill which counsel had presented to the judge to sign, it is clearly evident that this court would not have the power in this proceeding to command him either to prepare a bill of exceptions for counsel nor to sign the bill which was presented to him.

The writ is, therefore, refused and judgment is rendered for the defendant.

GRANT, J., and LIEGHLEY, J., concur.

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VALIDITY OF AN AGREEMENT BY AN EXECUTOR TO SELL.

Court of Appeals for Hamilton County.

**MORRIS U. BERNHEIM V. EDGAR STARK, EXECUTOR AND TRUSTEE
UNDER THE WILL OF MARY ANN BRITT, DECEASED, ET AL.**

Decided, June 10, 1918.

Power of Executor and Trustee—To Contract for Sale and Lease of Property—Not Affected by Contest of Will—Where the Result is a Judgment Upholding the Will—Lease With Privilege of Purchase—May be Made by Trustee Having Authority to Sell and Invest.

1. Under a will giving to an executor and trustee power to sell and lease real estate belonging to the testatrix, suspension of that power for the time being, pending a contest of the will, did not preclude the trustee from entering into an agreement for the sale or lease of property, contingent upon the validity of the said will being established, where the contracting purchaser knew of the existence of proceedings involving the validity of the will; and the termination of such a suit in a judgment upholding the will leaves the trustee clothed with all the power and authority conferred by the will as and from the date of his appointment.
2. An executor and trustee, having authority under the will to sell or lease property, is at liberty to enter into an agreement whereby a purchaser is to pay for the property in part and take a lease for a period of years with a privilege of purchase for the amount remaining due under the agreement, interest on said amount to be paid at a stipulated rate during the term of the lease.
3. Such a sale and lease is not rendered invalid by reason of the fact that the term of the lease may exceed the term of the trust, inasmuch as failure of the lessee to exercise his privilege of purchase could only result in reclamation of the property parted with after a very considerable payment had been made thereon, and in case of a division of the property becoming necessary before expiration of the lease the ground rent could be sold and the estate closed.

*Jonas B. Frenkel and Philip Roettinger, for plaintiff.
Charles H. Stephens, Jr., and Rufus B. Smith, contra.*

WILSON, J.

This cause came into this court on appeal from the Court of Common Pleas of Hamilton County, and is now submitted

to the court on plaintiff's demurrer to the answer and cross-petition of the defendant, Edgar Stark, executor of the estate of Mary Ann Britt, deceased.

The demurrer rests upon the ground that the allegations of the answer, and also of the cross-petition, do not constitute either a defense or a cause of action against the plaintiff.

The court's disposition of this demurrer will in effect determine the rights of the respective parties to this action.

On February 26, 1913, the plaintiff Morris U. Bernheim made the following proposal for the purchase of certain property of the estate of Mary Ann Britt, deceased:

"CINCINNATI, OHIO, February 26th, 1913.

"EDGAR STARK, Executor & Trustee Under the Will of Mary Ann Britt deceased.

"I hereby agree to purchase the property belonging to the estate of Mary Ann Britt, deceased, situated in the city of Cincinnati, Hamilton county, Ohio, and known as Nos. 126 and 128 W. Eighth st. and 804 and 806 Elm st., bounded and described as follows:

"Beginning at a point in the north side of Eighth street., thirty-six (36) feet more or less east of Elm st., thence eastwardly along Eighth st., fifty-nine feet four and one-half (59 ft. 4½ in.) more or less; thence northwardly parallel to Elm st. ninety (90) feet more or less to Weaver alley; thence westwardly along Weaver alley ninety-five feet four and one-half (95 ft. 4½ in.) more or less to Elm st., thence southwardly along Elm st. thirty (30) feet more or less; thence eastwardly parallel to Weaver alley thirty-six (36) feet more or less; thence southwardly parallel to Elm st., sixty (60) feet more or less to Eighth st., at the place of beginning.

"The consideration for said property is to be one hundred and twenty-five thousand (\$125,000) dollars to be paid as follows: Upon the acceptance of this offer I will deposit five thousand (\$5,000) dollars with the Union Savings Bank & Trust Co., as a special deposit on which the said company is to pay interest at the rate of 3 per cent. per annum. In the event that the courts decide that the will of Mary Ann Britt is valid, said sum of five thousand dollars shall be paid by the Union Savings Bank & Trust Company to the executor and trustee under the will of Mary Ann Britt, and upon the tender to me of a lease containing the provisions hereinafter set forth, duly executed by him, I will further pay to such executor and trustee the sum of forty-five thousand (\$45,000) dollars in cash.

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Said lease is to be for twenty years from date and to provide for a ground rent of 5 per cent. net upon the remainder of said purchase price, to-wit: seventy-five thousand (\$75,000) payable quarterly. The lessee shall therein obligate himself to pay in addition to said ground rent, all taxes, rates, charges and assessments of every kind which may become a lien upon the property after the date of said lease and, further, that he will within ten (10) years from the date thereof erect a building or buildings upon said property so leased, satisfactory to the lessor, and keep the same insured in a sum and in companies satisfactory to the lessor, loss, if any, payable to the said lessor on account of the purchase price of said property or to be applied in re-building, as the lessor may elect. But if the lessor elect to take the insurance on account of the purchase price the lease shall terminate, and the balance of the purchase price, if any, become payable.

"Said lease shall further contain a privilege to the lessee to purchase said property at any time after ten years from date, upon giving six months' notice in writing to the lessor.

"If the executor and trustee under the will of Mary Ann Britt can not give me a good and legal title to all the property above named, I am to have the right to cancel this obligation to buy said property, and in that event the \$5,000 paid by me on the acceptance of this offer is to be refunded to me, together with the interest on said deposit, at 3 per cent per annum."

Which proposal or offer was accepted by Edgar Stark, defendant, as the representative of said estate, in the following language:

"CINCINNATI, OHIO, February 27, 1913.

"I hereby accept the foregoing offer, upon the conditions therein named, and agree to make the lease therein provided for, in case the will of Mary Ann Britt is sustained."

This action was instituted by the plaintiff for the purpose of obtaining a cancellation of the contract created by said offer and acceptance, and the return of the sum of five thousand dollars deposited under the terms of said contract, and in his petition alleges as grounds therefor that the defendant Edgar Stark, executor and trustee under the will of Mary Ann Britt, deceased, was, under the laws of Ohio and under the terms of said will, without authority or power to enter into any contract

whereby he could execute a lease for the time and upon the terms in said contract set forth, and further, "that he is without power under said will *at this time* to enter into such a contract or to perform the stipulations therein set forth"; that said Edgar Stark, as executor and trustee under the will of Mary Ann Britt, deceased, can not give a good and legal title to all of the property described in the petition.

To this petition the defendant Stark, executor, filed an answer and cross-petition admitting certain allegations in the petition: the death of Mary Ann Britt leaving a will, a true copy of which is attached to plaintiff's petition; that said will was contested in case No. 146202 of the Common Pleas Court of Hamilton County; that he entered into the contract set forth in plaintiff's petition; that the plaintiff deposited the five thousand dollars called for under said contract; and that plaintiff had made a demand of him to return said five thousand dollars with which demand defendant refused to comply. And further answering, defendant denies that he is without authority or power under the laws of Ohio and under the terms of the will of Mary Ann Britt, deceased, to enter into any contract whereby he could execute a lease upon the premises described for the time and upon the terms set forth in said agreement; and denies that he can not give a good and legal title to all of the property described in the petition; and further denies the right of plaintiff to cancel said agreement. And further, by way of answer, defendant says that the last will and testament of Mary Ann Britt was sustained by the judgment of the Common Pleas Court of Hamilton County; that subsequent thereto the defendant duly executed a lease of the property described in the contract, in accordance with the terms and conditions expressed in said contract, and on the 7th day of July, 1915, tendered said lease to the plaintiff and demanded of plaintiff the payment of \$45,000 in cash and that the plaintiff execute said lease, all of which plaintiff refused to do. Defendant further alleges that all of the devisees and beneficiaries under the will of Mary Ann Britt, deceased, prior to the making of the contract February 26, 1913, approved of the same and requested the defendant to

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enter into said contract with plaintiff. And by way of cross-petition the defendant alleges that he was appointed as executor and trustee under the will of Mary Ann Britt, deceased, and that he is now acting as such; that on February 26, 1913, he entered into said contract with plaintiff, and that he entered into the contract with the approval and at the request of all the devisees and beneficiaries under said will; that the plaintiff deposited the said sum of \$5,000 as required by the contract; that the will of Mary Ann Britt was sustained by the Court of Common Pleas of Hamilton County, Ohio; that on July 7, 1915, he duly executed in duplicate and tendered to plaintiff a lease in conformity with the terms and conditions set forth in said contract, and demanded of plaintiff the \$45,000 in cash called for by said contract; that the plaintiff refused to pay said sum of \$45,000 and refused to execute said lease; that he had complied with all the terms and conditions of said contract, but that the plaintiff had refused to comply with said contract and to carry out the terms thereof. The defendant thereupon prays for a judgment against the plaintiff for said sum of \$45,000 and interest from July 7, 1915, and for an order requiring plaintiff to perform his part of said agreement by executing the lease provided for in said agreement, and for such further or other relief as the defendant may be entitled to in equity.

To this answer and cross-petition the plaintiff demurred, for the reason hereinbefore set forth.

The demurrer presents for the consideration of the court two legal propositions:

1. Could the executor and trustee—assuming that he had the power and authority under the will to sell or lease the property described in the agreement—enter into an agreement such as the one described in the petition for a sale or lease of said property during the pendency of the action contesting the validity of said will?

2. Has the executor and trustee under the terms and provisions of the will of Mary Ann Britt the power and authority to make a sale or lease of said property on the terms and conditions expressed in the agreement under consideration?

The will of Mary Ann Britt, deceased, provides as follows:

"IN THE NAME OF GOD, AMEN.

"I, Mary Ann Britt, being of sound mind, do make and publish this my last will.

"Item First. I direct my Executor and Trustee herinafter named to set apart and keep suitably invested sufficient of my estate to produce a net yearly income of Forty-eight Hundred (\$4,800) Dollars and from said income pay monthly during life the sum of One Hundred Dollars to each of the following persons, to-wit: my brother Francis I. Partridge, my niece Mrs. McEwen, my niece Mrs. Dixon and my niece Blanche Partridge.

"Item Second. I direct my said Executor and Trustee to set apart and keep suitably invested a sum sufficient to yield a net income of One Hundred Dollars per month and pay the same monthly to my nephew Arthur J. Partridge son of said brother, until he arrives at the age of twenty-five years and then to pay to him the principal sum so invested.

"Item Third. I direct my said Executor and Trustee promptly after my death to pay the sum of One Hundred Dollars to each of five priests in the diocese of Cincinnati to be named by the Most Rev. Archbishop, with the obligation of saying masses for the repose of my soul. Also to pay promptly the following charitable bequests: to the St. Joseph Orphan Asylum now at Cumminsville the sum of Five Hundred Dollars; to the Sisters of Charity for Seton Hospital the sum of Five Hundred Dollars; to the Sisters of the Good Shepherd for the institution now conducted by them on Price Hill the sum of One Hundred Dollars.

"Item Fourth. I give to my sister Mrs. Margaret Orr the full one-third of my estate.

"Item Fifth. All the rest and residue of my estate I give as follows: one-fourth thereof to my nephew Arthur J. Partridge, one-fourth to my niece Mrs. McEwen, one-fourth to my niece Mrs. Dixon and one-fourth to my niece Blanche Partridge. Said rest and residue shall be divided upon the death of my brother Francis I. Partridge. Thereupon the provision of One Hundred Dollars a month to my nephew and nieces shall cease.

"Item Fifth. Should any of my legatees contest this my will, his or her portion shall become part of the residue of my estate.

"Item Sixth. I nominate and appoint Edgar Stark or whoever may be the trust officer of the Union Savings Bank and Trust Company of this City, Executor and Trustee of this my will. I give him full power to sell, lease, divide or rent any of my real or personal property and execute proper instruments for that purpose, to make repairs or improvements, to make and

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change investments and generally to do such things as may be necessary and proper in the administration of my estate and the trusts reposed in him without applying to court for leave so to do. I direct that in case any of my bequests or devises should be subject to any inheritance or other tax, the same to be paid by my estate. I hereby vest in my said executor or Trustee such title as may be necessary to carry out the provisions of this my will.

"Cincinnati, June 27, 1910.

her
"MARY ANN (X) BRITT
mark

"Signed and acknowledged as and for her last will by the said Mary Ann Britt in our presence and we have at her request and in her presence and in the presence of each other signed the same as attesting witnesses.

"ROY W. KINSEY, M. D.

"J. STEWART HAGEN, M. D.

"JOHN LEDYARD LINCOLN."

As to the first proposition presented the court is of the opinion that the executor and trustee under said will had the power and authority to sell or lease said property and for that purpose to enter into an agreement for such sale or lease.

It is contended, however, that during the pendency of the contest of said will, and under and by virtue of Section 10633, General Code, the execution of the power of disposition either by sale or lease, conferred on the executor and trustee by the will, was suspended until the validity of said will was finally established. By its very terms the agreement entered into between the plaintiff and the defendant Stark, executor, etc., as set forth in plaintiff's petition was not to become operative or of any binding force and effect between the parties until the validity of said will was established and when so established the power and authority conferred by said will on the executor and trustee to sell or lease said property was to be exercised by him, and the trust imposed executed, but only however after the termination of the suspension of that power by the declaration of the validity of said will.

Contracts for the sale of real estate contingent upon the happening of certain events are matters of every day experience in real estate transactions, and the court is unable to see any reason

in law for a distinction in that respect between an individual and an executor and trustee, both of whom being clothed with power and authority to sell or lease upon the happening of the event. This court is, therefore, of the opinion that the suspension of the execution of the power conferred by the will on the executor and trustee pending the contest of the will did not preclude him from entering into the agreement for the sale or lease of said property contingent upon the validity of said will being established.

The institution of proceedings to contest the validity of a will naturally cast a doubt upon the validity of proceedings of an executor in the administration of the trust, for he would be unable to perform any act which would be binding upon the heirs at law or distributees at law contesting the will in the event the will was set aside. The contrary would of course be true if the will were sustained, but no one dealing with the executor in the meantime could be sure whether or not he had authority as such, and the practical consequence would be that no one would deal with an executor under such circumstances and there would be no administration of the estate as long as the contest continued. The Legislature realizing the necessity for some remedial legislation on the subject enacted a law, Section 10633, General Code, enabling the executor to do certain things which are necessary and proper to be done in the administration of the estate whether the will be sustained or defeated, which acts of the executor shall be binding upon all parties. The statute is therefore an enabling one and is not intended as a limitation or restriction of the powers of the executor.

There is no fraud or concealment alleged nor is it alleged that any misrepresentations were made inducing plaintiff to enter into the agreement. On the contrary it is apparent from a reading of the agreement that the plaintiff knew of the pendency of the proceedings involving the validity of the will and the effect it had upon the power of the executor and trustee to sell and convey the property, for in his offer to purchase the property—the agreement—he expressly stipulated that:

“In the event that the courts decide that the will of Mary Ann Britt is valid, said sum of \$5,000 shall be paid * * * to the executor and trustee,”

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and further providing for the carrying out of the agreement.

Conditional contracts for the purchase and sale of real estate have been subjects of more or less litigation, and as a result we have a variety of opinions upon the subject each of which depending upon its own peculiar facts. A case somewhat analgous to the case at bar is to be found in *In re Parsons Estate*, 98 Cal. Rep., 603; on page 612, the court say:

"The purchaser from an executor at a sale under a power in the will, deals with him in making the purchase as he would with any other vendor. He makes the purchase subject to a confirmation by the court, but in all other respects he may incorporate in his contract of purchase the same terms and conditions as he would in dealing with any other agent for the sale of property. And he can repudiate his contract for purchase only for the same reasons as he could in case he had bought for another."

In the above case the performance of the contract—and thereby the execution of the power conferred by the will—was contingent upon an act to be performed by the court. In the case at bar the performance of the contract is contingent upon the court's declaring the will valid.

In the case reported in 76 O. S., 97, *Archdeacon, Admr., v. Cincinnati Gas Company*, the question involved was as to the right of the administrator to maintain an action brought by him on March 28, 1903, as administrator of the estate of John Archdeacon, when as a matter of fact he was not the administrator and was not appointed as such until March 10, 1905, defendant contending that he was wholly without authority to act at the time of instituting the suit. The court held, in the syllabus:

"The general rule that due qualification of an administrator relates back to the time of his appointment as regards acts done by him in the interim which are for the benefit of the estate, applies to a case of this character. The commencement of the suit by the administrator, therefore, being for the benefit of the estate, was the valid commencement of an action."

So, in the case at bar, the removal of the impediment to the execution of the powers conferred by the will, by the declara-

tion of its validity, left the executor and trustee clothed with all power and authority conferred by the will as and from the date of his appointment, and he is therefore bound by his act of February 26, 1913, in entering into said agreement, provided, however, his act is not in excess of the power and authority conferred on him by said will.

In the case of *Wilson v. Wilson*, 54 Mo., 213, the court say:

"A will giving power of sale vests the title in the executor at the time of testator's death, and his deed of the property made before probate of the will is a good conveyance provided the will be subsequently probated."

The second proposition is: Had the executor and trustee under the will of Mary Ann Britt, deceased, power and authority to sell or lease said property on the terms and conditions expressed in said agreement?

As we enter upon the consideration of this proposition we are confronted with the question: Does the agreement so entered into, when fully executed, constitute in fact a sale or lease of the property? It is evident from a reading of the agreement that the plaintiff wanted to purchase the property, for he says in the opening paragraph of his offer:

"I hereby agree to *purchase* the property belonging to the estate of Mary Ann Britt, deceased."

And after describing the property he further says:

"The consideration for said property is to be \$125,000 to be paid as follows": * * *

It further provides that in case of loss by fire:

"Loss, if any, payable to the said lessor *on account of the purchase price* of said property."

And again:

"If the lessor elects to take the insurance on account of the *purchase price*, the lease shall terminate, and the balance of the *purchase price*, if any, become payable,"

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The defendant, Stark, in accepting the proposition says:

"I hereby accept the foregoing offer, upon the conditions therein named."

True, the agreement provides that after the \$50,000 is paid on the purchase price a lease duly executed by the executor and trustee shall be given plaintiff for a term of twenty years at an annual ground rent of five per cent. upon the remainder of the purchase price, to-wit, \$75,000, and containing a privilege to said lessee to purchase said property at any time after ten years from the date, upon giving six months notice in writing to the lessor.

In construing this agreement it is necessary to take into consideration the circumstances surrounding the transaction and the intention of the parties, as well as the language used in expressing that intention. And in considering those matters the court has concluded that the agreement is an agreement for the purchase and sale of said property, and that while it is provided that a lease shall be given with the privilege of purchase for the remainder of the purchase price of \$125,000 viz., \$75,000—it is but another method intended by the parties for the securing to the seller the balance of the purchase price rather than through the usual form of a mortgage. The method so pursued is not an unusual one; on the contrary it is frequently resorted to in the bargain and sale of real estate. This conclusion we feel is strongly supported by the fact that a very large part of the purchase price—forty per cent.—is to be paid in cash at or before the execution and delivery of the lease.

It is contended however, on the other hand, that the executor and trustee had no power under the will to sell said property on any terms other than for cash, and that if the agreement is construed as one for the purchase and sale of the property it is not enforceable, for the reason that the terms of payment expressed in the agreement are contrary to and in excess of the power and authority to sell conferred by the will of Mary Ann Britt, deceased.

The will of Mary Ann Britt provided as follows:

"I give him full power to sell, lease, divide or rent any of my real or personal property and execute proper instruments for that purpose * * * to make and change investments, and, generally, to do such things as may be necessary or proper in the administration of my estate and the trusts reposed in him, without applying to court for leave so to do. * * * I hereby vest in my said executor or trustee such title as may be necessary to carry out the provisions of this my will."

To enable said executor and trustee to sell and convey said real estate the testator clearly by her will vested a fee simple title thereto in her executor and trustee and clothed him with full power and authority to do such things as may be necessary or proper in the administration of her estate and the trust reposed in him. She authorized him to sell or lease her real estate, and for that purpose to do such things as may be necessary or proper in administering the trust so reposed.

The executor and trustee was clearly authorized to sell the real estate described in the agreement, and the testator having failed to specify the terms and conditions upon which such sale or sales should be made—on the contrary, she having authorized him to do such things as may be necessary or proper in the administration of the trust—she thereby vested in him a discretionary power as to what would under the conditions and circumstances be proper and to the interest of her estate in making such sales. The testatrix clearly intended to rely upon the judgment of her executor and trustee in the management and sale or lease of her property and for that purpose she made as complete a grant of power as it was possible for her to do. In addition to her giving him power to sell and lease her property, she also gave him full power to make and change investments. Can it be contended that under such power he would not have the authority to invest in a ground rent which in his judgment was a good investment? Having authority to so invest the funds of the estate could he not have sold the property for cash and have subsequently purchased a ground rent of this same property yielding five per cent. upon \$75,000, that being only sixty per cent. of the supposed value of the property? If so, we can see no reason in law or in equity why he may not

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be permitted to do directly what he could properly and legally do indirectly. Clearly if the executor sold the property for cash he would have to re-invest the fund.

A trustee with unfettered power to sell undoubtedly has the right to make reasonable terms as to payment, consistent with the best interests of the estate. Whatever is fairly and reasonably necessary to carry out the power would be implied and included in it.

Perry on Trusts, Section 786a, states the following as the rule controlling sales by trustees:

"If, however, the sale is made for a change of investment, the trustee may take a mortgage upon the property sold if it is real estate; for investments in mortgages of real estate, in the absence of any provision in the instrument of trust to the contrary, are permitted by law."

In *Lenigan v. Yeiser*, 115 Wis., 304, the court say, Syl. 6:

"Under a power to sell lands and invest the proceeds it is proper, in the absence of any provision to the contrary, to take a mortgage on the property for a reasonable part of the price."

In this case the sale was made to a life tenant and a mortgage was accepted for a large part of the price, running for twenty-five years, at two per cent., and the court held:

"That the sale would not be declared void because of the extent of the credit given at such low rate of interest, no prejudice having resulted to the remainderman."

It was contended in this case that the sale was invalid because of the credit given for the price and that a sale on such credit was beyond the power conferred by the will which, being silent as to terms, it is assumed must be construed to authorize a sale for present money. And on page 313 of the opinion the court say:

"It seems plain that when the duty of a selling trustee is to keep proceeds of a sale invested, he can not do so more surely than by leaving a reasonable amount thereof secured upon the property sold. Nothing can then happen to the estate more

prejudicial than the return to it of the very property parted with, which is not injurious, if enough of the price is collected, or otherwise secured, to cover expenses of sale and of reclamation."

The foregoing case very aptly expresses the views of this court on the subject under consideration.

This will clearly and unequivocally gives to the executor and trustee the power to lease the property, without restrictions or limitations as to the terms and conditions of such lease. Counsel for plaintiff contend, however, that the executor and trustee could not lease for a term extending beyond the term of the trust, which might be the case if the agreement were fully executed. By Item Fifth of her will she provided for a final division of her property in the following language:

"All the rest and residue of my estate, I give as follows: one-fourth to my nephew Arthur J. Partridge; one-fourth to my niece Mrs. McEwen, one-fourth to my niece Mrs. Dixon, and one-fourth to my niece Blanche Partridge. *Said rest and residue shall be divided upon the death of my brother Francis I. Partridge.*"

Of course we have no assurance that Francis I. Partridge will not survive the period of the lease, and the court can not therefore say that the lease will extend beyond the period of the trust. If it does not, then there is no authority in law which would justify the court in saying that said executor and trustee could not enter into a lease of said property for the period provided for in said agreement.

In the case of *Greasen v. Ketteltas*, 17 N. Y., 491, there was involved the validity of a lease made by a testamentary trustee for a term of twenty-one years, and the court say:

"A trustee holding a legal fee, determinable when the purpose of the trust shall cease, has power at law to lease for a term of years which may extend beyond the period of his trust estate, subject to the jurisdiction of a court of equity to annul the lease if unreasonable or improvident."

If Francis I. Partridge should not survive the period of the lease and it became necessary for the executor and trustee to

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divide the estate, he clearly would have authority to sell and dispose of the fee of said property, the ground rent, for the purpose of making said division, and would not thereby violate any of the provisions of said will.

The court is therefore of the opinion that the allegations contained in the answer of Edgar Stark, executor, constitute a defense to the cause of action set forth in the petition; that said executor and trustee has power and authority under the will to convey to plaintiff such title to said property as was possessed by the testator; and that the allegations set forth in the cross-petition of said Edgar Stark, executor, constitute a good cause of action for the relief therein sought.

The demurrer will therefore be overruled.

JONES, P. J., and HAMILTON, J., concur.

ERROR TO MOTION TO DISCHARGE ATTACHMENT.

Court of Appeals for Clinton County.

PENNINGTON V. THE REPUBLIC MOTOR TRUCK CO.

Decided, January 13, 1917.

Jurisdiction of Court of Appeals—On Error to Motion to Discharge Attachment—Final Judgment.

The judgment of a court of common pleas in granting a motion to discharge an attachment, where such motion was before the common pleas court upon appeal from the action of a justice of the peace, is a final judgment which is subject to review by the court of appeals.

Smith & Clevenger, for plaintiff in error.

G. P. Thorpe and *A. R. Hoffman*, contra.

JONES (Oliver B.), J.

This is a proceeding in error brought to review the judgment of the court of common pleas in granting a motion to discharge an attachment, where such motion was before the common pleas court upon appeal from the action of a justice of the peace thereon, under the provisions of Section 10260, General Code.

The defendant in error, by a motion to strike the petition in error from the files, raises a question of the jurisdiction of this court to entertain these proceedings. The right of the circuit court to review such proceedings was recognized by the circuit court in at least two cases: *Bernard v. Schwartz et al*, 22 C. C., 147, and *Benoski v. The C. F. Adams Co.*, 18 C.C.(N.S.), 478, 479. And the right to review was denied by the circuit court of the first circuit in at least three cases: *Lyon v. Phares*, 9 C.C.(N.S.), 614; *Williams v. McCartney*, 10 C.C.(N.S.), 161, and *Greenhow v. Harrison*, 12 C.C.(N.S.), 128.

As Section 10260, General Code, itself designates as a "judgment" the action of the court upon final hearing of a motion to discharge, and provides that it shall be transmitted with the original papers to the justice of the peace and such judgment entered by him upon his docket as the final determination of the motion, we must consider this action of the court of common pleas as a final judgment which is subject to review by this court under the provisions of Section 6, Article IV of the Constitution as amended, as construed by the Supreme Court of Ohio in *Cincinnati Polyclinic v. Balch*, 92 Ohio St., 415.

The motion to strike the petition in error from the files is therefore overruled.

Coming to review the action of the common pleas court in discharging the attachment, we find that the question as to whether the attachment should be sustained or discharged depends upon the ownership or title to the property attached at the time the attachment was levied. The evidence upon this question is in the form of affidavits embodied in a bill of exceptions. Possibly, if we had been occupying the position of a trial court, our finding as to the title of the property attached might not have coincided with that of the learned judge who passed upon the evidence in that court; still we can not say that his finding is so manifestly against the weight of the evidence as to require a reversal.

Finding no prejudicial error in the record, the judgment of the court of common pleas is affirmed.

JONES (E. H.), J., and GORMAN, J., concur.

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**DETERMINATION OF CONFLICT BETWEEN THE TORRENS AND
THE MECHANICS' LIEN LAWS.**

Court of Appeals for Cuyahoga County.

ROY W. MIZNER v. HOSEA PAUL, ETC., ET AL.

Decided, July 15, 1918.

Torrens and Mechanics' Lien Laws Not Incompatible—Former Constitutes an Exception to the Latter—Right to File Lien Lost by Mechanic, When—Protection to Bona Fide Purchaser of Registered Land Against Claim Not Shown on His Certificate.

1. A *bona fide* purchaser of registered land who relies upon the certificate of title, takes the land free of inchoate mechanics' liens which do not appear upon the certificate.
2. Where registered land was involved, a mechanic, having a valid claim under the mechanics' lien law, had complied with such law in all respects, but had failed to file a caveat or notice of his right to claim a lien or to have a memorial of same inscribed on the certificate of title. *Held*: He lost his right to file an affidavit for such lien after the property was transferred to a *bona fide* purchaser.
3. The mechanics' lien law and the Torrens law are not incompatible; but the privilege granted by the former of acquiring liens is restricted in its exercise by the latter law. The Torrens law will therefore be given effect as an exception to the mechanics' lien law.

White, Brewer & Curtiss and Bulkley, Hauxhurst, Saeger & Jamison, for plaintiff in error.

M. P. Mooney, Howard A. Counse, C. W. Swartzel and J. M. Ulmer, contra.

DUNLAP, J.

This case is here on error to the land court of Cuyahoga county, and involves the question of the validity of mechanics liens taken under the mechanic's lien law against property registered under the Torrens law.

On April 7, 1915, certain lots were duly registered under what is known as the Torrens law, Section 8572 and sub-sections of the

General Code, in the name of James G. Bingham. These lots were legally transferred to other owners and all became the property of the Seward Land & Building Company sometime in 1917, the actual date not being important. After that company had become the owner of said parcels of land, and after the title thereof in fee had been registered in its name, it commenced the construction of a house on each of said lots, and in and toward the erection and construction of these houses Roy W. Mizner, present plaintiff in error, furnished labor and materials for the tinning work, under contracts with said the Seward Land & Building Company. He performed the last of said labor and furnished the last of said materials on October 18, 1917, on one lot, and October 20, 1917, on the other two lots, and not having been paid in full his contract price for said material and labor he did, within sixty days from said last mentioned dates, on December 17, 1917, tender to the recorder of Cuyahoga county his affidavits for mechanics' liens against said premises prepared and executed in accordance with the mechanics' lien law. Before said date of December 18, however, the Seward Land & Building Company had transferred all of said sub-lots to an innocent *bona fide* purchaser who had no knowledge that the said Mizner had not been paid in full for all labor performed and materials furnished, and had no knowledge that the said Mizner intended to file or tender to the recorder for filing, affidavits for mechanics' liens against said property.

The recorder of the county, Mr. Paul, upon the tender of these affidavits to him, was in doubt whether, under the circumstances above set forth, he should file the affidavits for mechanics' liens and, therefore, acted under Section 8572-40, which provides that where the recorder is in doubt upon any question relative to registered land, he may refer the question to the common pleas court for decision. The recorder duly referred the question to the court of common pleas, which we have heretofore spoken of as the land court, and on February 13, 1918, said court found, as a matter of law, that the said Mizner was not entitled to file said affidavits for mechanic's liens and to have the same entered and noted on said certificate of title of said respective premises.

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The plaintiff in error thereupon filed his petition in error in this court as provided for in Section 8572-80, and thereby asks reversal of this order of the court of common pleas.

The question involved in this case can now be stated in the abstract and is:

Does a *bona fide* purchaser of registered land who relies upon the certificate of title, take the land burdened with inchoate mechanics' liens which do not appear upon the certificate?

If this question is answered in the affirmative, then the judgment under review must be reversed, and if answered in the negative, the same must be affirmed.

The solution of this question is not without some difficulty, as it raises a question of conflict between two sets of laws, one set the mechanics' lien laws and the other the Torrens registration law. By the mechanics' lien laws a person furnishing material and labor for the construction of an improvement upon land is apparently without reservation, entitled to a lien upon said land, the only apparent condition being that the lien be perfected within sixty days after the furnishing of the last labor or material for said improvement. The Torrens act, upon the other hand, expressly provides "that no statutory or other lien shall affect the title to registered land until after it is noted upon the certificate." And by Section 8572-25 it is provided:

"Section 25. Every applicant who without fraud on his part receives a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land, who takes a certificate of title for value and in good faith, shall hold the same free from all estates and encumbrances except those noted on the certificate and any of the following estates and encumbrances which may be existing:

"First. Liens, claims or rights arising or existing under the laws or Constitution of the United States which the statutes of this state can not require to appear on record in the recorder's office.

"Second. Taxes, within six years after they have been entered upon the tax duplicates and become due and payable.

"Third. Any highway, public way, or private way laid out or acquired under the provisions of law or otherwise, unless the certificate of title states that the non-existence of such way, or

the boundaries thereof if the same exists, have been determined by the court.

"Fourth. Any lease for a term not exceeding three years, when there is actual possession under the lease.

"Fifth. Right of appeal and to prosecute error within thirty days after decree of registration,

"Sixth. If there are easements or other rights appurtenant to a parcel of registered land which for any reason have failed to be registered, such easements or rights shall remain so appurtenant notwithstanding such failure, and shall be held to pass with the land. This section shall be printed or written on all duplicate certificates of title before delivery by the recorder."

It will be noted that by none of the provisions of said section are mechanics' liens expressly provided for. It will thus be seen that the mechanics' lien law says that every person furnishing material or labor whom we shall hereafter designate as a mechanic—shall have his lien, and the Torrens law says in effect that every *bona fide* purchaser shall have his land free from such lien. It is our duty, if possible, to so construe these laws that both may stand.

It is apparent that the mechanics' lien law is a general law of general application, furnishing a general plan by which mechanics' liens can be obtained. The Torrens law is likewise a general law insofar as the manner of registering land is concerned, but it is urged that it has some special provisions in it relating to mechanics' liens and the steps necessary to obtain such liens against registered land. It is not disputed that such is the case. It would be useless, of course, to dispute the fact that Section 8572-75 recognizes the right to file mechanics' liens against registered land. Its provisions are as follows:

"8572-75. Every voluntary instrument intended to be used in transferring any title or estate in registered land, or in creating any lien or charge thereon, or assigning, releasing or discharging any lien or charge in whole or in part, and every certificate or other paper filed with the recorder for the purpose of acquiring or creating an involuntary lien, interest or charge upon registered land, shall at least refer by number to the certificate of title covering such land or containing a memorial of such interest, lien or charge, such reference to be contained in the body of all

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voluntary instruments and in the case of such certificate or papers so filed to acquire involuntary interests, liens, or charges to be either in the body thereof or indorsed thereon and the indorsement duly signed by the proper officer or a person in interest. And in case only a part of the land covered by such certificate of title is sought to be affected, an accurate description of such part enabling the same to be definitely located and platted shall be given in such voluntary instrument, or in or upon such certificate or paper so filed in addition to such reference to the certificate of title by number."

It is plain that an affidavit to obtain a mechanic's lien is here provided for. It is described by the terms "every certificate or other paper filed with the recorder for the purpose of acquiring or creating an involuntary lien, interest or charge upon registered land," and what said certificate is required to contain is provided for in the next words, which are "shall at least refer by number to the certificate of title," etc. Here we have a plain provision before us for the securing of mechanics' liens against registered land and requiring something a little different from the affidavit required by Section 8314 of the General Code, which provides the general form of affidavit required for obtaining a mechanic's lien. It has not been seriously disputed that such provision must be followed and that in spite of the fact that the Legislature had provided a general law fixing an apparent sweeping right to mechanics' liens, that that exact method has been somewhat supplemented by this section which is quoted when it comes to securing such lien against registered land, and upon this point at least the Torrens act must be regarded as an exception to that general plan. Up to this point we have no serious difficulty nor can the mechanic entitled to the lien have any serious objection to this requirement. The only danger to him is that he may think that all the laws upon the subject of mechanics' liens are contained under that heading in the code, but such is not his guaranteed right. Instances of similar exceptions are all too frequent in our General Code, and although regrettable are necessarily unavoidable.

There is, however, one deducible and logical conclusion from the exception above noted, and that is the mechanic seeking

a lien must acquaint himself with the fact as to whether or not the property upon which the lien is sought is "registered" properly. This inference is fair and does not, we think, do violence to any of the provisions of the mechanics' lien law, but granting all this, i. e., both the fact that he must put into his affidavit the registry number and that he is charged with knowledge that it is registered land, it is insisted that he can not be deprived of the right so plainly given him by the mechanic's lien law to take sixty days from the time of the last furnishing of material, etc., in which to file his affidavit. Such right is not taken away from him by the Torrens act providing the property remains in the contracting owner's hands, but it is not to be denied that the words of this act do take this right away when said land passes into the hands of a *bona fide* purchaser. That is to say, this act purports to give to a *bona fide* purchaser who has purchased the land during said period of sixty days the right to rely solely upon the certificate of title or certificate of registration, and that if such lien is not noted thereon he is not chargeable with the same. We are inclined to the opinion that insofar as this right is taken away from the mechanic that the Torrens act is to be treated as an exception to the mechanic's lien law.

Section 89 of the Torrens Act provides: . . .

"Sec. 8572-89. No statutory or other lien of whatever kind or nature except judgments in the United States courts and taxes shall affect the title to registered land, until after the same is noted upon the registered certificate of title."

The term "statutory or other lien" as used in this section must be construed so as to include, and plainly does include, a mechanic's lien. We have already noted the necessary inference that the mechanic seeking a lien is charged with knowledge that the property is registered. This being granted he need suffer no loss by reason of this Torrens law except by his own volition. If with knowledge that the land is registered he fails to protect himself so that he may have his lien at the proper time, we think it can be demonstrated that he has no one but himself to blame.

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Section 8572-68 provides, we think, for almost every contingency that can arise. It is as follows

"8572-68. Any person desiring to assert any interest in or claim or lien against registered land adverse to the title of any registered owner, and not shown upon the register when no provision is by this act made for registering the same in the recorder's office, may make affidavit thereto, setting forth his interest, right, title, claim, lien, charge or demand, and how and under whom derived, and the character and nature thereof. The affiant shall state his full name, place of residence and postoffice address and shall designate a place within the state at which all notices relating thereto may be served upon him; or if he be a non-resident of the state, the name, residence and postoffice address of some person residing within the state upon whom service may be made as his agent and by which service he will be bound the same as if made upon the claimant within the state. Upon the filing of such affidavit in the recorder's office the recorder shall enter forthwith a memorial thereof, upon the registered certificate of title, stating the exact time when said affidavit was filed and the purport and nature thereof."

And it is conceded in argument that the mechanic by filing what is known as a caveat under this section can give notice to a prospective purchaser of a right to a lien, and it is conceded that notices can be given by mechanics, by which term we include, laborers or material-men, to the owners of property that they are about to furnish work, labor or material for the improvement of a particular piece of property. Therefore, we arrive at the conclusion that all the mechanic need do to protect himself so that registered land shall not be transferred so as to defeat his proposed lien, is to avail himself of the privilege afforded by the comprehensive section last referred to, to-wit, Section 8572-68.

A matter that must have strong bearing upon the proper solution of this question by the court is that the Torrens law was enacted by the Legislature with full knowledge of the provisions of the mechanics' lien law and that the effort was made by the Legislature to make them compatible and consistent is clearly shown by reference to the sections which we have quoted referring to mechanics' liens, or at least including by their terms

mechanics' liens. The two laws seem incompatible only in that a privilege granted by one has apparently been taken away by another, and yet an analysis of that other shows a method in which even this privilege may be exercised, if not quite fully yet with restrictions which do not appear unreasonable. The right to a mechanic's lien is not lost but its exercise is restrained and restricted. It exists fully as against the contracting owner as is fully provided for by Sub-section 81 but it can only be exercised on registered land as against a *bona fide* purchaser when the provisions of Sub-section 68 are complied with. The mere fact that the Legislature saw fit to make such a provision with regard to registered land and did not see fit to make the same provision with regard to unregistered land is to our mind no argument against the requiring by a mechanic of an affidavit coming under said Sub-section 68 if he desires a lien upon registered property and desires to so protect his lien that a transfer to an innocent *bona fide* purchaser may not interfere with his said right. If Section 68 which we have just referred to or any other section for that matter, or an independent section, contained a clause to the effect that the provisions of the mechanics' lien law shall not apply to registered land insofar as *bona fide* purchasers are concerned, unless the mechanic should file affidavit before such change of ownership setting out the facts constituting his inchoate lien, would any one question the validity of such provision? Surely any liberal construction of this Torrens act must necessarily read into the law just such a provision, and Section 101 provides that the Torrens act shall be construed liberally for the purpose of effecting its general intent. True the mechanics' lien law is also to be construed liberally, but a liberal construction does not entitle it to take a prohibited construction, that is, a construction absolutely prohibited by another section of the code which yet provides a special means for the operation of that law and for the retention of all the benefits of that law. The case is presented for the application of the rule of construction laid down in *Gas Company v. Tiffin*, 59 O. S., 420:

"It is a settled rule of construction that special statutory provisions for particular cases operate as exceptions to general

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provisions which might otherwise include the particular cases, and such cases are governed by the special provisions,"

and the application of this rule is not rendered inappropriate by the fact that the mechanics' lien law has been amended since the passage of the Torrens law. This fact, we think, does not affect the rule laid down in *Rodgers v. The United States*, 185 U. S., 83, the syllabus of which is in part as follows:

"Where there are two statutes, the earlier special and the later general (the terms of the general being broad enough to include the matter provided for in the special) the fact that one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

And 36 Cyc., 1151, where it is stated:

"*General and special statutes.* Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy, but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to or qualification of the prior general one, and where the general act is later the special will be construed as remaining an exception to its general terms, unless it is repealed in express words or necessary implication."

In addition it may be said that even though the Legislature did amend the mechanics' lien law since the passage of the Torrens law it is not to be presumed that its attention was called to any apparent inconsistency between the two laws, so that the fact of a later amendment can be of little force in determining the question at issue.

We approve of the language of the Attorney-General of Ohio in this respect as taken from the Reports of the Attorney-General of 1914, page 1195:

Cincinnati v. Westinghouse Co.

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"As the land registration act is the later enactment, and is furthermore a special statute, I think that instead of calling for the doctrine of implied repeal, this state of affairs justifies the application of the theory that where the same statute, or different statutes upon the same subject, contain incompatible provisions, one of which is general and the other special, the latter shall be held and treated as an exception to the former."

We have carefully considered the very able briefs which have been filed on both sides of this interesting question and our conclusion is that the land court of this county did not err in reaching its conclusion, and its judgment is affirmed.

GRANT, J., and LAWRENCE, J., concur.

ABANDONMENT OF A BRANCH INTERURBAN LINE.

Court of Appeals for Hamilton County.

CITY OF CINCINNATI ET AL V. WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY ET AL.*

Decided, November 26, 1917.

Public Utilities Commission—Alone Empowered to Authorize the Abandonment of an Interurban Road—Necessary Parties to an Application for Leave to Abandon.

1. Authority to discontinue service on an interurban line, the dismantling of the road and sale of its tangible property can be granted only by the Public Utilities Commission.
2. Receivers of an interurban road, appointed for the purpose of preserving and operating the property pending a settlement between the company and its creditors, are without authority to apply for an order to abandon and dismantle the line. Such an application must come from the corporation itself, and municipalities, villages and counties through which the road passes and which have granted franchises for its operation are proper parties and should be heard.

*Motion for an order directing the Court of Appeals to certify its record in this case dismissed in the Supreme Court by consent of counsel, July 2, 1918.

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Charles A. Groom, City Solicitor, for City of Cincinnati.

Charles A. Brannock, for village of Bethel.

Charles G. White, *Charles C. Kearns* and *Eli H. Speidel*, for village of Amelia and commissioners of Clermont county.

Smith Hickenlooper, for commissioners of Hamilton county.

Fulford, Shook & Wilby, for property owners.

Dinsmore & Shohl, contra.

PER CURIAM.

In the Common Pleas Court of Hamilton County, on October 1, 1914, two receivers were appointed by that court upon the application of the plaintiff below, in an action brought merely for the purpose of taking possession of the property of the Interurban Railway & Terminal Company and managing and controlling it and operating its traction lines, and were authorized and empowered to employ the necessary assistants, purchase the necessary material and make the necessary contracts to continue the operation of the roads.

The appointment of these receivers does not appear to have been ancillary to any other relief prayed for. These receivers were appointed upon the consent of the defendant company.

These receivers continued to operate the three lines of the defendant company for a period of about two and a half years and are still in the possession and control of the properties of the defendant Interurban Railway & Terminal Company, and are operating the three lines of road owned by it: one to New Richmond, Clermont county, Ohio; another to Bethel, Clermont county, Ohio; and the third line to Lebanon, Warren county, Ohio.

On April 25, 1917, these receivers filed a petition, in the common pleas court which had appointed them as receivers, praying for an order authorizing them to dismantle one of the lines of the said company, to-wit, the line running from Cincinnati to Bethel, Ohio, and to discontinue the operation of the road and to sell and dispose of all the tangible property, including the rails and ties, the overhead wiring and poles. They represented to the court that they had an offer from the Clermont Construc-

tion Company to pay for the tangible property \$240,000, par value of first mortgage bonds, and \$433,000, par value of the common stock of the Cincinnati, Georgetown & Portsmouth Railroad Company, a competing traction line paralleling almost the entire distance between Bethel and Cincinnati the line of the Interurban Railway & Terminal Company.

The court, upon the application, and after giving notice made an order directing the receivers to dismantle the road known as the Suburban Division of the Interurban Railway & Terminal Company, and to sell and dispose of the tangible property upon the terms stated in the application.

Before this order was made the villages of Bethel and Amelia, the city of Cincinnati, to which was annexed the village of Mt. Washington, the county commissioners of Hamilton county and the county commissioners of Clermont county were all made parties upon the proper application and were given leave to plead—these political subdivisions having granted the franchise to the Suburban Division of the Interurban & Terminal Company several years ago. These new defendants objected to the granting of the application and excepted to the order of the court of common pleas authorizing the receivers to dismantle the road and discontinue its operation.

It appears from an examination of the pleadings in this case that there was no authority vested in these receivers to dismantle this interurban road or to sell the tangible property, and the court of common pleas had no power or authority to make such an order. These receivers were appointed to take charge of the property and preserve the same, and to maintain and operate it pending a settlement between the defendant company and its creditors. The effect of dismantling the road and selling the rails, ties, overhead construction and movable property would be to abandon the franchise, and this could be done by the company only and not by these receivers.

It is true that the company through its secretary comes in and consents to the granting of the application made by the receivers, but this can not confer power on the receivers to abandon the road, nor to dismantle it. Nor is it the equivalent of an applica-

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tion made by the corporation itself to abandon its franchise.

Under the law as it now exists, Sections 501, 501-2, 504-2, 504-3, General Code, this company can not abandon its tracks and discontinue its service except upon an application made to the Public Utilities Commission of the state of Ohio. See Section 501, General Code; also, an act passed by the Legislature March 21, 1917 (107 O. L., 525), entitled "An act enlarging the powers and duties of the public utilities commission with reference to the abandonment of service and facilities by railroads."

We do not pass upon the question of the authority of the court of common pleas originally to appoint these receivers for the purposes for which they were appointed, as that question is not raised in the record in this case, but we hold that under the order appointing these receivers it was their duty to preserve the property, maintain the road and operate it, and not to abandon it and sell the movable property as junk. The right to abandon the road, if any exists at this time, is in the defendant Interurban Railway & Terminal Company. The public, the villages of Bethel and Amelia and the city of Cincinnati, and counties of Hamilton and Clermont, which granted these franchises, have an interest in the maintenance and operation of the traction lines, and they are therefore proper parties in this case and should be heard objecting to the discontinuance of the operation of the road.

For the reasons stated the judgment of the court of common pleas is reversed, and the cause is remanded for further proceedings.

JONES, P. J., GORMAN, J., and HAMILTON, J., all concur.

TO COMPEL PROVISION FOR CHILDREN OF SCHOOL AGE.

Court of Appeals for Tuscarawas County.

NATHANIEL SIBER ET AL V. STATE OF OHIO, EX REL FREDERICK
E. HERSHEY ET AL.

Decided, June 26, 1918.

Schools—Necessary Parties to Action in Mandamus—To Compel Provision of Proper School Advantages—Evidence Required to Compel Official Action.

1. Section 7731 makes the county board of education the real party defendant in an action to compel the conveyance of pupils of school age residing therein to some other school within the rural school district, and failure to make said county board a party defendant leaves the petition open to demurrer.
2. Furthermore the absence of any evidence of notice to the county board, or of knowledge on its part, of refusal by the township board to convey the pupils in question to some school in said district, is fatal to an action in mandamus to compel provision of such service, under the rule that in a proceeding to compel an officer to do an act which it is claimed the law enjoins upon him the existence must be shown of all facts necessary to put him in default.

E. E. Lindsay, Prosecuting Attorney, and *E. C. Seikel*, for plaintiffs in error.

C. L. Cronebaugh, contra.

HOUCK, J.

The defendants in error here were the relators in the common pleas court.

The suit was one in mandamus, in which it was sought to compel the defendants below, the plaintiffs in error here, as members of the board of education of Dover township rural school district of Tuscarawas county, Ohio, to re-establish what was formerly known as "Sub-district School No. 12" or to convey the pupils of school age residing therein to some other school within said rural school district.

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A demurrer was filed to the petition, stating four grounds:

1. That the facts stated in the petition were insufficient in law.
2. Defect of parties plaintiff.
3. Defect of parties defendant.
4. That plaintiffs had no legal authority to bring suit.

The trial judge overruled said demurrer and exceptions were taken to same. Answer was filed, which in substance, was a general denial.

Trial was had and the petition was dismissed as to the question of re-establishing said reputed sub-district School No. 12, but judgment was entered for plaintiffs, allowing a peremptory writ of mandamus against the members of the board of education of the Dover township rural school district, ordering and directing said board of education to convey said pupils of school age to the nearest school in said Dover township rural school district.

We have carefully read the testimony in the case, as contained in the bill of exceptions, and have made an examination of the record here presented for the purpose of determining as to whether or not there is such error prejudicial to the rights of plaintiffs in error as would authorize a reversal of the judgment.

In our opinion the judgment of the common pleas court should be reversed for two reasons:

1. There is a misjoinder of parties defendant. The real party defendant should be the county board of education of Tuscarawas county, Ohio. We reach this conclusion because of the provisions of Section 7731, General Code, as found in Vol. 170, page 625, Ohio Laws, which reads:

“* * * When local boards of education neglect or refuse to provide transportation for pupils, the county board of education shall provide such transportation and the cost thereof shall be charged against the local school district. When the county board of education certifies to the county auditor the amount paid for such transportation, the county auditor shall transfer such amount from the funds due the said board of education to the county board of education fund.”

The undisputed evidence is that a demand was made upon the board of education of Dover township rural school district, but none was made upon the county board of education, and there is an entire absence of proof, showing or tending to show, that the county board of education had any knowledge whatever of the failure or refusal of said board of education of Dover township rural school district to convey the pupils in question to some school in said district. Applying the statutory law just quoted to these facts we feel the conclusion thus reached is sound.

2. We hold the rule is well established that in a proceeding by mandamus to compel an officer to do an act which it is claimed the law enjoins upon him, the existence of all the facts necessary to put him in default must be shown.

Testing the evidence in this case by the rule of law thus laid down, we find that it does not measure up to it, and, therefore, the trial judge was in error in entering the judgment in the present case. The errors referred to being prejudicial to the rights of the plaintiffs in error, judgment of the common pleas court must be reversed.

Judgment reversed and case remanded for further proceedings according to law.

POWELL, J., and SHIELDS, J., concur.

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Cuyahoga County.

CONFLICT BETWEEN STATUTORY AND CITY CHARTER PROVISIONS.

Court of Appeals for Cuyahoga County.

AUGUST FROELICH V. CITY OF CLEVELAND.

Decided, July 15, 1918.

Home Rule—May Not be Defeated by Encroaching Statutory Provisions—Regulatory Measures by the Council of a Charter City—Paramount to those of the State Legislature—Where Relating to Matters of Local Concern—Regulations as to the Use of Streets.

1. In case of conflict between an ordinance of a charter city, having reference to a matter of purely local concern, and a state law covering the same subject, the ordinance is supreme and the conflicting provision of the statute falls.
2. Conviction of violation of an ordinance of the city of Cleveland, limiting the size of the loads which may be drawn over the streets of that city to ten tons including the weight of the vehicle, is not affected by the fact that a state law provides a different maximum load.

Hole & Hole, for plaintiff in error.

W. G. Fitzgerald, contra.

GRANT, J.

Error to the municipal court.

The plaintiff in error—defendant below—was arrested, tried, convicted and sentenced, in the lower court, the charge against him being a violation of the following ordinance of the defendant city:

“Section 1343e. No load in excess of ten (10) tons in weight, including the weight of the vehicles, shall be propelled or driven upon or over the streets of the city, provided, however, that the director of public service may issue permits in special cases for the carrying of heavier loads upon or over certain streets specially designated in the permit.” * * *

The sole assignment of error relied on here to work a reversal of this judgment of conviction and sentence, is that the city of

Cleveland was without constitutional power to pass the ordinance in question; and this is so—it is said—because the ordinance is in plain and destructive conflict with the following statute law of the state of Ohio—the sections being those of the General Code:

“Section 7248. No person, firm or corporation shall transport over the improved public streets, highways, bridges or culverts within this state, in a vehicle propelled by either motor or muscular power, a burden, including weight of load and vehicle, greater than the following:

“In vehicles having iron or steel tires three inches or less in width a load of five hundred pounds for each inch of the total width of tire surface on all wheels. When the tires on such vehicles exceed three inches in width an additional load of eight hundred pounds shall be permitted for each inch by which the total width of the tire surface on all wheels exceeds twelve inches;

“In vehicles having tires of rubber or other similar substance a load of eight hundred pounds for each inch of the total width of tire surface on all wheels. The provisions of this section shall not apply to iron or steel tire horse drawn vehicles when in use upon the streets or thoroughfares of cities or upon the streets and thoroughfares of villages, except such streets and thoroughfares therein as have been or may hereafter be improved by the state or county.

“Sec. 7249. No traction engine, trailer, steam roller, automobile truck or other power vehicle carrying a weight in excess of four tons, including weight of vehicle, shall be operated upon any of the improved public streets, highways, bridges or culverts within this state at greater speed than fifteen miles per hour, and no such vehicle carrying a weight in excess of six tons, including the weight of such vehicle, shall be operated upon any such a street, highway, bridge or culvert at a speed greater than eight miles per hour when such vehicle is equipped with iron or steel tires or at a speed greater than twelve miles per hour when such vehicle is equipped with tires of rubber or other similar substance.

“Sec. 7250. The weights of loads prescribed and the rates of speed mentioned in Sections 7246 and 7249 inclusive of the General Code shall not be decreased or prohibited by any ordinance, resolution, rule or regulation of a municipal corporation, board of county commissioners, board of township trustees or other public authority.”

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Inasmuch as the ordinance forbids that which the statute by not forbidding permits, we take it to be manifest that in this respect and to that extent the two are in conflict; and in view of the writ of prohibition served on the municipality by the last quoted section of the statute, we must conclude that the variance was premeditated and invited, and amounts to a challenge of the charter of the city, under favor of which the ordinance was passed.

Our present duty, therefore, is now owed to finding out which of these two repugnant enactments bears the image and superscription of Caesar; which of the two is in their conflict paramount? Which is the law of the case? If the statute is so, then the accused was illegally convicted and the judgment should be reversed. If the ordinance is the law applicable, then the conviction was right and must stand.

This inquiry calls for a consideration of the charter of the city of Cleveland.

The grant of power conferred on the latter by the Constitution of Ohio, is to be found in the Eighteenth Article of that organic instrument, adopted September 3, 1912, Section 3 whereof is as follows:

“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”

The seventh section of the same article is in the following language:

“Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this article, exercise thereunder all powers of local self-government.”

Availing themselves of the permissions thus constitutionally accorded to them, the people of Cleveland adopted their charter and there is no doubt that it delegates to the city legislative authorities ample power to pass the ordinance in question, and to its executive power to enforce obedience to it, unless some

superior source of jurisdiction may of right interfere and forbid it. So much, we think, will not be controverted.

The history involved in these provisions of the organic law of 1912 is too recent to require recitation, and so well known in its purpose and intendments, that we are not at liberty to ignore it and pass upon the issue at bar as if it had no history.

For some years prior to the revision of 1912, the limitations imposed by the Constitution of Ohio on the powers of the people to order their own domestic and local affairs in their own way, had been severely felt and acrimoniously discussed throughout the state. It was felt that municipalities should have a free hand in administering laws appertaining to their police needs, without the interference constantly inspired by the Legislature, made up of men in no way responsible to those whose concern they were all the while meddling with and whose plans for a better local government they were bringing to naught. The idea was embodied in the term "home rule," and the agitation culminated in the convention of the year last mentioned.

It may with confidence be affirmed that the idea of local self-government was dominant in that body and its work, overtopping in interest and outcome all other considerations and resulting in what the framers of the revised instrument and the people back of them believed was the planting in it of their will in this respect, beyond the power of the Legislature to overturn, uproot or undermine. Their wish found expression in the provisions of the Constltution just quoted.

Those provisions evidence the unquestionable public policy of the state, to be obeyed and respected accordingly by every means and all agencies charged with the duty of administering them in all integrity, by advancing the remedies furnished by them and enforcing all appropriate sanctions necessary to make them obeyed and effective. There is no reason to think that this policy has since become unsettled. It has been crowded from the front by dangers larger than those against which its business is to safeguard the common welfare—that is, a peril now looms higher on a wider horizon of immediate vision; but that it will resume its former importance as the exigencies of the present are met and

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pass from view, is not to be doubted, as we think. In any event, a retreat from this policy must, if at all, be sounded by the same power which commanded the advance, the people themselves, by constitutional means; the courts can not be drafted to the service of sappers and miners in overthrowing what the popular hands so laboriously and in the face of so much opposition built up.

Nor can the courts aid in the undermining process by indirection, by refining away the barriers of the Constitution and sterilizing what the people planted as fruitful agencies for coming to their own.

There is reason to fear, if not to believe, that the average congregation at Columbus would be more than glad to resume its ancient function of governing Cleveland in matters solely of Cleveland concernment as well as that of the state, if the opportunity to do so were to be restored by the courts. The member from Poor-cuss township ordinarily esteems it a duty as well as a privilege to interfere and impose his own idea—perhaps the term is rather a strong one for him—or his whim, or his prejudice, on the numerous inhabitants and the large interests of cities as far beyond his range of mental vision as they are from his sequestered bailiwick. The statute, the paramountcy of which is insisted on here, was passed, at least as to its present form, since the adoption of the constitutional provision and since the Cleveland charter was framed in promotion of its permissive authority; the statute therefore in purpose can be regarded in no other light than as throwing down, deliberately, a challenge to the conflict between Cleveland and Podunk assembled at Columbus. If the challenger prevails, then a succession of such invitations to conflict with resulting victories each time, would end in sending the charter to the wall and the absorption in the State House of all the powers which the Constitution and public policy of the state meant to reserve to, and concentrate in, the city hall, with all the abuses incident to such absorptive appetites. The result of the undermining process, if successful, would be to return to power the abuses of the old and evil time and reimpose them on the now free municipalities of the state with as firm a seat as the Old Man of the Sea had on the shoulders

of Sinbad the Sailor. The long cherished and hardly won victory of reform in matters of domestic concern and local self-government, now crystallized and imbedded in the Constitution, would be frittered away, and the dead and buried charter would deserve the epitaph which the late Gen. Schenck proposed for his bill, defeated by similar means—"Nibbled to death by pismires!" Personally, I confess to having no sympathy with the end in view and no disposition to assist in the process by which it is proposed to reach it, except in obedience to a plain duty imposed by law and in clearing my oath of office.

To see whether judicial duty requires this reluctance—natural in the citizen having the principle of letting people order their own concerns in their own way, under law—to be overcome in obedience to the commands of a superior power, calls for an examination, somewhat critically—as its importance deserves—of this question of paramountcy now put in issue in such form as to require a categorical answer, which—no matter what becomes of this judgment after it leaves its present field of review—must stand as the law of the case.

The conflicting nature of the two enactments involved in this inquiry, the statute and the ordinance, being admitted or found, the decisive underlying question arises, as we think, as to whether the things forbidden to be done by the latter, but within limits permitted to be done by the former, are so forbidden and denounced by the ordinance as offenses to be punished, are so forbidden in the exercise of a power of local self-government under the charter of Cleveland, to the effect of taking them out of the inhibition arising from a conflict between the local law and a general law of the state, or what purports to be a general state law. For it will take more than a state law, general in terms and general in operation through the state elsewhere than in charter governed municipalities, to work the effect of annulling the judgment of conviction before us. There must be a denial of the conclusion that the subject dealt with by the ordinance is a matter peculiar or appropriate to "local self-government," within the contemplation of the article of the Constitution with which this conviction has to do.

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That inquiry being answered one way or the other, and one way or the other we shall be able to answer the question of paramountcy, upon considerations of both principle and authority, as we think.

If any matter more than another comes within the ordinarily conceived definition of local cognizance, if anything is to be thought as coming within the notion of "local police," "sanitary," or matters "similar" in scope and significance to these, that thing must be affairs which deal with, and concern a city's streets. To say that a city must at its own proper peril keep its streets and ways open, practicable for safe travel, in repair and free from nuisance, and pay for any violation of this law-imposed duty, and yet have its control over those same streets under the supervision of a foreign authority, when by the organic law it is clothed with the right of exclusive dominion over things of local and domestic concernment, seems to us preposterous. To admit it would make the Constitution in this most important respect self-destructive; it would permit the small political units of the state to dictate to the powerful cities their internal policies and to defeat those which would not measure up, or down, to the rural ideas of the backwoodsmen. It would open to the forces of intrigue and chicane, incarnate in a legislative lobby, the most vital interests of great bodies of people, representing the opulent cities and emasculate the virility from governments which can be honest and efficient only when they are brought frequently face to face with the governed and be made to account at each recurring election at the bar of the local masters. Such a state of affairs would reduce the theory of the new Constitution to a governmental solecism, an absurdity and a standing invitation for home rule to commit hari-kari.

We have no difficulty in finding that such is not a doctrine in consonance with, or permitted by the Constitution of 1912.

Having thus concluded, any remaining inquiry is answered, we think, by a consideration of the footing upon which the court proceeded in *Billings v. Cleveland Railway Company*, 92 O. 3., 478.

That case is referred to in the brief for the plaintiff in error

here, where its application to the case in hand is denied. We think differently. It is inadequately reported, in the respect that the points relied on by counsel are not stated. But as the case was tried first in this court, we are quite familiar with the line of argument pursued. It was to the effect that as Euclid avenue was at a remote period in its history a state or county road and as such had been amenable to general Ohio law of state authority and making, and since the jurisdiction thus conferred had in no way been withdrawn, although by becoming a street of Cleveland that road had passed under city control as a concrete matter of administration, and because state laws required consents from abutting owners before the tracks of the defendant railway company could be laid in the avenue between East Twenty-second street and East Fortieth street, whereas the charter gave the right burdened by no such consents, the charter thus and thereby came in conflict with a general state law in that regard, and so was inoperative and void; such was the argument. The Supreme Court denied the contention. It found, first, that the right of the abutting owner to give or withhold consent, was not a property right.

No more, as we view the matter, has an Akron truck driver a property right to traverse the streets of a city other than his own, with truck overloaded to an extent incompatible, in the estimation of the city which is chargeable with the safety and upkeep of those streets with that safety, at his own will and pleasure, subject only to a state law, different in its permissive use of streets and roads of the whole state from that which Cleveland has by ordinance seen fit to prescribe and limit.

Its further finding was that the subject of the litigation, to-wit, the use and control of a street of Cleveland, was a subject which might be provided for by a charter adopted under the power granted by the Home Rule provision of the Constitution now under consideration. Having proceeded thus far towards an ultimate solution of the question in hand, the court stated its corollary thus:

“Such consents are not property rights, but rights in their nature personal to each owner of an abutting lot.

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“Such personal rights were bestowed by the General Assembly on owners of abutting lots as a check upon the power of the municipality. The right referred to not being a property right (the taking of which would violate the guaranties of the Constitution, unless done by due process of law and after full compensation), it follows that the statute conferring it, being a matter of local concern, when inconsistent with the provisions of the charter passed under favor of the Constitution, would fall simply because it *was* inconsistent.”

Otherwise stated, when a state law undertakes to deal with a local affair, so far forth it becomes a matter of local concern itself, and coming in judicial collision with an ordinance constitutionally competent to prescribe exclusively the terms upon which alone that matter of local concern shall be exercised or controlled, the statute fails and the charter and ordinances passed in pursuance thereof become supreme. Both sources of authority, the city council and the state Legislature, can not be dominant in the same field of jurisdiction. If two ride on the same horse, one must ride behind. Given the fact of inconsistency and the further fact that the matter is of local concern, the Legislature retires and leaves the council the master. We have these two postulated facts—a conflict and a subject of local concernment.

Obviously, to our apprehension, the same conclusion must follow. It would not be difficult, as we think, to reach the same result upon other avenues of approach, both upon the reason of the thing and adjudicated cases. But it is not deemed necessary to do so.

It follows that of the two pieces of legislation, the ordinance, as applied to this case, is paramount, and the claimed controlling force of the statute must be denied.

There are some other technical points raised by the record under review, but they are not insisted on, nor are they material.

There is no error apparent in the judgment complained of, and it is, therefore, affirmed.

LAWRENCE, J., concurs; DUNLAP, J., dissents.

[DAMAGES DUE TO OIL ESCAPING INTO A COAL MINE.]

Court of Appeals for Franklin County.

ROCK RUN COAL CO. v. CHARTIERS OIL CO.

Decided, March 21, 1916.

Gas and Oil—Liability for Permitting Oil to Escape from Oil Well Into a Coal Mine—Not Avoided by Trespass to the Mine Owner.

An oil company, holding an oil and gas lease covering lands upon which a coal company is operating a coal mine which has been extended to contiguous lands, is liable under Section 945, G. C., for damages resulting from the escape of oil to adjoining land and its percolation into said coal mine causing explosions and fire therein, notwithstanding the coal mine had been extended beyond the limits of its lease and to land to which neither the coal company nor the oil company have any mining rights.

C. M. Addison, for plaintiff in error.

D. N. Postlewaite, contra.

ALLREAD, J.

The coal company brought an action against the oil company to recover damages in the amount of fifty thousand dollars based upon the alleged negligence of the oil company in allowing oil to escape from its well and percolate into the mine operated by the coal company, whereby in the ordinary operation of the mine a fire was started and still rages in plaintiff's coal mine.

The coal company owns certain coal lands and holds a lease from the Hocking Valley Products Company of certain contiguous coal lands upon which the coal company was operating a coal mine.

The oil company has an oil and gas lease from the same lessor covering the lands leased by the coal company, together with other contiguous lands, and has certain oil wells in operation.

It is charged in the petition that the oil company so carelessly and negligently operated its oil wells, particularly well No. 19, as to permit the escape of oil and its percolation into the strata of coal forming the facing of the coal company's mines and that in the operation of said mines an ordinary and usual explosion occurred, starting the fire, above referred to.

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One issue tendered in the answer was to the effect that the coal company has extended its mining operations beyond the limits of its lease and into territory upon which it had no mining rights.

There was evidence tending to prove that well No. 19 of the oil company was not located upon the territory included in the coal company's lease.

There was also evidence tending to show that the coal company's employees had extended its mining operations beyond the limits of its lease in the direction of well No. 19.

There is also evidence tending to prove that in mining operations it is difficult for operators to determine when the exact boundary line of the lease was reached; that the lessor had been asked to furnish a surveyor, but that the agent of the lessor had stated that it made no difference whether the exact line was passed or not, as the coal could not be mined by anyone else.

There was testimony on behalf of the oil company tending to contradict the statement that it would consent to the extension of the mining operations beyond the exact boundary line of the lease.

The court charged the jury in substance that the oil company owed the coal company no duty in respect to confining its oil if the coal company was at the time and place of the explosion mining coal upon the land beyond its own premises and thereby closer to the defendant's oil well.

There are several paragraphs in the charge upon this subject, all of which are consistent and to the effect that the coal company could not recover, if defendant's operations at the time and place of the explosion were upon the land which it had no rights under the lease or license.

There was a verdict and judgment in the trial court for the defendant. The case is brought here upon petition in error, and the chief, if not the only error assigned, is in relation to the charge of the court in respect to the right of plaintiff to recover in case his operations had extended beyond the limits of its lease or license.

It must be remembered that the oil company had no coal rights, but only the right to drill and operate oil and gas wells. The coal company by extending across the line of its lease on

the other lands of the lessor was violating no property right of the oil company.

Defendant in error relies largely upon the case of *Wheeling & L. E. R. R. v. Harvey*, 77 Ohio St., 235. We think, however, there are two very important distinctions between that case and the one at bar; first, the plaintiff here is not a trespasser against any of the defendant's rights and, second, a statutory obligation which can not be limited merely to the owner of the land adjacent as claimed to have been violated.

In respect to the first definition, we think that the court is not entitled to say as a matter of law that the mere fact that the coal company has extended its operations beyond the territory included in its lease or license prevents recovery.

If the coal company was in fact a trespasser, it was between the coal company and its lessor. It is no defense in favor of the oil company.

In 29 Cyc., 443, it is said:

"To relieve one from liability on the ground that the injured person is a trespasser, the premises must belong to the person whose negligence is complained of."

A number of cases are cited in support of that proposition and we think it is sustained by the great weight of authority.

Upon the second proposition, the statute (Section 945, G. C.) fixed the duty of the oil company in drilling and maintaining wells through coal mines.

The duty so imposed by statute does not depend upon the legal title to the coal in the neighborhood of the oil well.

The statute was intended not only to fix the respective duties of the operator of the oil well and of the owner of the coal mine, but to make the operation of the coal mine safe and to prevent the starting of destructive fires.

It would be too narrow a construction of this remedial statute to hold that the duties so prescribed do not extend to a coal mine operator who accidentally or even intentionally goes beyond the limits of his lease.

The error in the court's charge was vital and substantial and must be presumed to have influenced the jury in the rendition of the verdict. The judgment of the court of common pleas,

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should, therefore be reversed and cause remanded for a new trial.

FERNEDING, J., and KUNKLE, J., concur.

DENIAL OF CIVIL RIGHTS TO PERSONS OF JEWISH EXTRACTION.

Court of Appeals for Cuyahoga County.

ASA ANDERSON V. STATE OF OHIO.

Decided, July 15, 1918.

Civil Rights—Denial to Jews of Admission to a Dance Hall—In Violation of Civil Rights.

The proprietor of a dance hall, who refuses admission to Jews desiring to enter and offering the admission fee, putting them off with the suggestion that they come some other time, is liable to the pains and penalties provided for those who violate the civil rights act.

J. J. McCormick, for plaintiff in error.

Jas. L. Lind and *E. E. Stanton*, contra.

GRANT, J.

Error to Municipal Court of Cleveland.

The plaintiff in error was arrested, tried, convicted and sentenced in the court below for a violation of Section 12940 of the General Code of Ohio, which provides as follows:

“Whoever, being the proprietor or his employee, keeper or manager of an inn, restaurant, eating-house, barber shop, public conveyances by land or water, theater or other place of public accommodation and amusement, denies to a citizen, except for reasons applicable to all citizens and regardless of color or race, the full enjoyment of the accommodations, advantages, facilities or privileges thereof, shall be fined.”

This statute embodies the criminal part of that portion of the legislation of Ohio once known as the civil rights act. Its policy and purpose are well known and the courts have consistently administered it in the spirit of its adoption and intent, which was to prevent discrimination in public enjoyments and privileges,

based on favoritism of race, color or other adventitious differences among those entitled to be served.

We have examined the bill of exceptions taken at the trial and find from it that the accused kept a place which is properly designated in the affidavit as a place of public amusement known as a dance hall. To its privileges and advantages he customarily admitted those who applied for admission and who paid his price, except in case of those whom he debarred if they did not pass an examination made by him and the test of which may fairly be concluded was based on the line of race. When several citizens offered their money, he inquired if they were Jewish. If they said they were, he refused them admission but told them to come some other day. He did not inquire for the race or nationality of others, but seems to have admitted them without test.

It does not concern us at all to inquire what the purpose or motive of the accused was in thus limiting his line of inquiry and exclusions to patrons of Semetic extraction, whether to favor the prejudices of a more favored set of customers, or on other grounds. Certain it is, in our estimation, that his place was one of public accommodation within the purpose and terms of the statute in question, and that he denied its privileges to men of one race but gave them to those of other races, if they asked for them and had the money required for their use and enjoyment.

Such being the conclusion of fact which the evidence tended to establish, the judgment of conviction is supported by it and is not contrary to it.

As to the specific assignments of error made in the brief, we are satisfied that the affidavit upon which the accused was prosecuted and his conviction had was sufficient in law and not defective in any material point.

The motion to strike testimony from the record was properly refused, and the trial court did not err to the prejudice of the accused in admitting evidence over his objection. The motion in arrest of judgment and for a new trial were severally properly overruled.

The most persistent race of which recorded history gives any account, has overcome too many obstacles to be defeated of a right secured to it by statute by any of the excuses offered by the dancing master in this record.

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What he did was in plain violation of the letter and policy of the law—intentionally so, in our opinion. Such is the finding and conclusion of a majority of the court.

The judgment is affirmed.

LAWRENCE, J., concurs; DUNLAP, J., dissents.

ESSENTIALS OF A CONTRACT TO PURCHASE REAL ESTATE.

Court of Appeals for Hamilton County.

LAUDT REALTY CO. v. JOHN F. PARCHMANN.

Decided, February 7, 1916.

What an Enforcible Agreement to Purchase Real Estate must Contain—Parol Evidence Inadmissible, When—Duplicate Receipt for Earnest Money Insufficient under the Statute of Frauds.

1. A contract for the purchase of real estate is not sufficient under the statute of frauds, unless it contains the essential terms of the agreement expressed with such clearness and certainty that they may be understood from the memorandum itself, or some other writing to which it refers, without the necessity of resorting to parol proof.
2. A duplicate receipt for earnest money which has been paid, which duplicate receipt has been signed by the intended purchaser and retained by the owner, and which expresses no contract for purchase except by implication, and fixes no terms whatever in regard to a sale beyond the mere naming of the price and identifying of the property, and which was not intended by the parties to embody such terms or to operate as a contract, is not a sufficient contract, under the statute of frauds, to bind the purchaser.

Edward A. Hafner and W. C. Muhlhauser, for plaintiffs in error.

C. J. McDiarmid, contra.

JONES (Oliver B.), J.

The contract under which plaintiffs were employed by defendant, as real estate agents to sell his house and lot, bound defendant to pay them a commission of two per cent. on the gross amount of such sale, if said property was sold during the period fixed in said contract. Plaintiffs found a party who in anticipation of signing a contract for the purchase of said real

estate made a payment of fifty dollars as earnest money to defendant and took his receipt for same. Afterwards said intended purchaser changed his mind and refused to sign the contract for purchase or to complete the purchase. He had, however, signed a duplicate of the receipt for the earnest money which had been paid, which duplicate receipt was retained by defendant, and which is in the following words:

"CINCINNATI, O., March 6, 11.

"Received from August F. Nolte the sum of Fifty dollars as part payment of earnest money on property belonging to John F. Parchmann at 4433 Colerain ave., Cin. O., valued at Two thousand five hundred and fifty dollars \$2550.00. Balance due Two thousand five hundred dollars. \$2500.00.

"(Signed)

JOHN F. PARCHMANN,

"AUGUST F. NOLTE."

It is contended this is a sufficient contract to bind the purchaser. In the opinion of the court this receipt is not such a memorandum of the agreement between the parties as is required under the statute of frauds, Section 8621, General Code. A contract under the statute of frauds is "not sufficient unless it contains the essential terms of the agreement expressed with such clearness and certainty that they may be understood from the memorandum itself or some other writing to which it refers, without the necessity of resorting to parol proof." *Kling, Admr., v. Bordner*, 65 Ohio St., 86.

This receipt expresses no contract for purchase except by implication. It fixes no terms whatever in regard to the sale beyond the mere naming of the price and identifying the property, nor was it intended by the parties to embody such terms or to operate as a contract, it having been agreed that a written contract would be prepared by the real estate agent and signed on the evening after this payment.

No sale was effected, and no enforceable contract was procured, and plaintiffs therefore were not entitled to recover under the terms of their contract with defendant. *Pfantz v. Humberg*, 82 Ohio St., 1.

Judgment affirmed.

JONES (E. H.), J., and GORMAN, J., concur.

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APPEAL OF ACTION TO FORECLOSE A MECHANIC'S LIEN.

Court of Appeals for Guernsey County.

H. E. EGGAR AND H. B. PIERCE, PARTNERS DOING BUSINESS UNDER
THE FIRM NAME OF EGGER & PIERCE, v. H. C. CORWIN ET AL.

Decided, November 15, 1917.

Mechanic's Lien—Action to Foreclose—Right of Appeal.

An action to foreclose a mechanic's lien is equitable in character and therefore appealable.

Charles S. Sheppard, for the motion.

Fred L. Rosemond, contra.

FARR, J.

Heard on motion to dismiss appeal.

On the 10th day of August, A. D. 1915, H. E. Egggar and H. B. Pierce, partners doing business under the firm name of Egggar & Pierce, brought an action in the court of common pleas of this county, against the defendants, H. C. Corwin, Edward Foreman, W. E. Laughlin, Estella Laughlin, Lauer True & Co., and the Eastern Ohio Railway Co., seeking to recover the sum of \$611.34 from H. C. Corwin and Edward Foreman, and to foreclose a mechanic's lien against the property of the Laughlins described in the petition. It is alleged in said petition that Corwin and Foreman, as principal contractors, contracted with Laughlins for the construction of a building upon said premises, and that plaintiffs, under contract with Corwin and Foreman, furnished material used in the construction of said building for which payment was not made, and to secure which they perfected a material-man's lien under the statute; other parties were made defendants, who filed answers and cross-petitions likewise claiming liens. W. E. Laughlin filed an amended answer, containing a number of grounds of defense to which a reply was filed and so the issues were made up, trial had, judgment entered, appeal to this court, and a motion filed to dismiss the appeal upon the ground that

there is no right of appeal in such case. If the right exists, it is under favor of Section 6, Article IV, of the Constitution of Ohio, as amended in A. D. 1912, effective January 1, A. D. 1913, which reads in part as follows: "The courts of appeals shall have * * * appellate jurisdiction in the trial of chancery cases." Therefore the issue here is whether or not an action to foreclose a lien is a "chancery case."

A mechanic's lien is purely a creature of statute (27 Cyc., 17, 317, 318, 321, Jones on Liens, Section 1184), and was unknown at common law or in equity; however the right thereto is favored by Section 33, Article II, of the present Constitution of Ohio, which provides that laws may be passed to secure to mechanics, artisans, laborers, sub-contractors and material-men their just dues by direct lien upon the property upon which they bestow labor, or for which they furnish material; and that no other constitutional provision shall limit this power. The foregoing has been amplified in Ohio by the present lien law for the benefit of contractors, sub-contractors, laborers and material-men, as found in 103 O. L., 369-379, and as amended 105-106 O. L., 522-534, new Sections 8310 to 8323-10, G. C. It must be conceded that this right, though statutory, is based upon the equitable doctrine that one who contributes labor or furnishes material used in the construction of a building, and for which payment is not made, may perfect and have a direct lien upon such building and real property on which it is located, and the procedure to subject such property to the satisfaction of the claim is regulated by statute in most jurisdictions (Jones on Liens, Section 1559). The first mechanic's lien law was passed in Ohio, January 1, 1823 (3 Chase, 2160), and was effective within the corporation of Cincinnati only. Section 3 of said act provides that every person or persons, holding such lien might proceed to obtain a judgment thereon according to the course of legal proceedings in like cases. This original act provided that the judgment should be obtained by "legal proceedings as in like cases." It doubtless was the legislative intent to make the procedure statutory, but the basic principle of the statute was, beyond all question, equitable in character as indicated especially by Section 1, and as well by other parts of said

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act. By subsequent legislation February 5, 1833, the provisions of said law were extended to Hamilton county and later amplified and made of general application (March 11, 1843, 41 O. L., 66, S. & C., 833). However the equitable principle upon which the original act rested was not changed, although Section 8 provides, as did Section 3 of the former law, that judgment might be obtained for the amount due according to the course of legal proceedings in like cases. If any doubt existed as to the remedy it was set at rest by the enactment of a remedial amendment to the foregoing, March 25, A. D. 1851, 49 O. L., 108, S. & C., 837, entitled "Remedy of lien holder in chancery," and reads in part as follows:

"(18) Section 1. Be it enacted by the General Assembly of the state of Ohio, that any person or persons, who now hold or shall hereafter hold a lien, under the above recited act, may in addition to the remedy therein provided for, proceed by petition in chancery as in other cases of liens, against the owner or owners of and all other persons interested in * * * any such * * * house, mill, manufactory, or other building, * * * and the lot or lots of land on which the same shall stand and obtain such final decree therein for the rent or sale thereof, as justice and equity may require." * * *

It is of more than passing interest to note that the language of Section 8323, G. C., which is a part of the Ohio lien law in force is almost verbatim with the above, excluding some matters later included to meet new conditions. It reads in part as follows:

"Section 8323. Any person holding a mechanic's lien, in addition to the remedies herein provided for, may proceed by petition as in other cases of liens, against the owner and all other persons interested * * * in any such house, mill, manufactory, or other building * * * and the lot of land on which it stands * * * and obtain such judgment therein for the rent or sale thereof as justice and equity may require." * * *

It might be urged, however, that the foregoing omits "in chancery" after the word petition and uses the word "judgment" instead of "final decree" near the conclusion. It was not necessary to continue the words "in chancery" because by the

adoption of a code of civil procedure March 11, A. D. 1853, effective July 1, A. D. 1853, 51 O. L., 57, the distinction between actions at law and suits in equity, and the forms of all such actions and suits theretofore existing, were abolished in Ohio and in their stead it was provided that there should be but one form of action to be called a civil action which it is provided in Section 55 must be commenced by filing a petition. That it was not the legislative intent to eliminate the chancery or equitable feature, is clearly disclosed by the following part of said Section 8323:

“Any person holding a mechanic’s lien, in addition to the remedies herein provided for may proceed by petition as in other cases of liens.”

Therefore, the words “in addition to the remedies herein provided” must be construed to mean that the statutory remedies are merely cumulative, and “may proceed as in other cases of liens” only strengthens the contention that it was not the intent to alter the equitable character of the remedy. Especially is this true in the light of the further provision that the lien holder may “obtain such judgment * * * as justice and equity may require.” Equitable relief can only be granted in a proceeding at least partially equitable in character. The word “judgment” is substituted in said Section 8323 for “final decree” in the former law; however, this too was changed by the adoption of the Code of A. D. 1853, of which Section 370 (51 O. L., 118) provides that “a judgment is the final determination of the rights of the parties in an action.” Therefore “judgment” is the proper word, although there may be a permissive use of it interchangeably with “final decree.”

Obviously it was not the legislative intent, by the adoption of the code of A. D. 1853, to deny the right to an action legal or equitable where it had formerly existed by statute and the mode of procedure was prescribed, at least until the Legislature should otherwise provide; and so it is indicated in Chapter VI of said code, Section 605 (51 O. L., 161), which reads in part as follows:

“Where by statute, a civil action, legal or equitable, is given, and the mode of proceeding therein is prescribed, this code shall

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not affect the proceedings under such statute, until the Legislature shall otherwise provide." * * *

The foregoing was a saving provision of said code within the purview of which the former mechanic's lien law (S. & C., 837) comes easily, and so it is observed by Mr. Seney in his Ohio Code of Civil Procedure at page 736 as follows:

"An action under the mechanic's lien law, by a mechanic, to recover from the owner a sum due him for services rendered to a contractor, is one of the cases in which a right of recovery by action is given by a statute anterior to the code, prescribing the form of the action, but not fixing the proceedings in the action given. *Chapman v. Rannels*, 2 Western Law Monthly, 142."

The above case of *Chapman v. Rannels* was decided June, A. D. 1859, after the adoption of the code. No legislative change has ever been made in the former lien law (S. & C., 837), so far as its equitable feature is concerned. It is also provided in Section 8323 that a lien holder may proceed "as in other cases of liens." A mortgage is a creature of statute but creates and is a lien, and its foreclosure is purely equitable.

In harmony with the foregoing, Mr. Jones in his work on liens, Volume 2, Section 1559, observes as follows:

"Whether the proceedings to enforce a mechanic's lien are legal or equitable depends, of course, upon the terms of the statutes providing the remedy. The statutes of several states assimilate the proceedings to enforce such lien to the equitable action to foreclose a mortgage, and under such statutes the proceeding is essentially a proceeding in equity."

The author might well include Ohio among said states because the above provision "as in other cases of liens" clearly assimilates the proceeding to enforce a mechanic's lien to the foreclosure of a mortgage, which is one of the "other liens" contemplated in said section. Bearing upon the issue under discussion here, is the case of *Wagner v. Armstrong et al*, 93 O. S., 443, in which Nichols, C. J., in an able opinion discusses among other things, "jurisdiction on appeal," and at page 450 pertinently observes as follows:

"Appealable cases, therefore, must be such cases as are now recognized as equitable in their nature; and perhaps the better way to express it would be, cases that were recognized as equitable actions before the adoption of the code of civil procedure; for, while our code established under one grand division all actions, whether of an equitable or a legal nature, and called them civil actions, yet there was no attempt to change the nature of the remedy."

An action to foreclose a mechanic's lien was recognized as equitable before the adoption of the code, because it was specially provided (49 O. L., 108, S. & C., 837) that a lien holder might proceed by petition in *chancery*. It is further urged that being of statutory origin, it can not at the same time be equitable in character; however, it is observed in 27 Cyc. at page 17, as follows:

"A mechanic's lien is a species of lien created by statute in most of the states, which exists in favor of persons who have performed work or furnished materials in and for the erection of a building. It is not a general, but a particular lien, and is in its nature peculiar and of an equitable character, and has been said to be somewhat analogous in its aims to the equitable lien of a vendor for unpaid purchase money of lands sold."

While statutory, its equitable character is recognized and it is further observed at page 321 that under some statutes the remedy for enforcement has been prescribed as an ordinary action at law, and such remedy has been held to be exclusive of the jurisdiction of a court of equity, but such was not the fact in the statute of this state prior to the adoption of the code for it was specially provided as above stated that the proceeding might be by petition in *chancery*; moreover the jurisdiction of courts of equity has been remodeled in England by statute, and in most of the states of the United States, as well as in the Federal courts, it depends upon special statutory enactments; 6 Am. & Eng. Ency. of L. (1st Ed.), 692.

In line with the foregoing is the above case of *Wagner v. Armstrong*, 93 O. S., 443, in which Nichols, C. J., observes at page 450 as follows:

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"The question yet remains, however, does the fact that there has been provided a statutory proceeding in partition operate to exclude partition from the category of chancery cases? The authorities on this subject are not all one way; but it can be ascertained by an independent examination of the authorities that the great weight favors the doctrine that the statutory remedy is cumulative and does not supersede the original jurisdiction in equity."

The learned judge then cites in support of the foregoing, 1 Story's Equity (13th Ed.), par. 658; Freeman on Co-tenancy and Partition (2d Ed.), 559, where it is stated in the latter:

"The remedy thus created by statute is, we think, generally, but not universally, considered as cumulative, and as in no way divesting courts of equity of their jurisdiction over the same subject matter."

Also *Wright v. Marsh*, 2 G. Greene (Iowa), 104; *Cram et al v. Green et al*, 6 O., 429; 1 Pomeroy, Section 62; *Feuchter v. Keyl et al*, 48 O. S., 357; *City of Zanesville v. Fannan*, 53 O. S., 605.

Following the suggestion of Nichols, C. J., in *Wagner v. Armstrong, supra*, at page 456, there will be no attempt here to categorically declare what constitutes a chancery case. However, there can be no question but that liens originated primarily in equitable principles, and so it is observed in 1 Pomeroy, page 95, as follows:

"Secondly, those cases in which the relief is not a general pecuniary judgment, but is a decree of money to be obtained and paid out of some particular fund or funds. The equitable remedies of this specie are many in number and various in their external forms and incidents. They assume that the creditor has, either by operation of the law or by contract, or from some sets of omissions of the debtor, a lien, charge, or incumbrance upon some fund or funds belonging to the latter, either land, chattels, things in action, or even money; and the form of the remedy requires that this lien or charge should be established, and then enforced, and the amount due obtained by a sale total or partial of the fund, or by a sequestration of its rents, profits and proceeds."

And at page 120 the author discusses equitable remedies as follows:

"These exclusive remedies may be granted in order to protect, maintain and enforce primary rights, estates or interests, which are legal as well * * * as equitable."

And again at page 152 it is said:

"It is one of the distinctive and central principles of the equity remedial system that it deals with property rights, * * * liens rather than with mere personal rights."

And again at page 153 the same author observes:

"A fourth class embraces those remedies which establish and enforce liens and charges on property rather than rights and interests in property either by means of a judicial sale of the property itself which is affected by the lien, and the distribution of its proceeds, or by means of a sequestration of the property and an appropriation of the rents, * * * until they satisfy the claim secured by the lien."

And as a summary of the foregoing it is observed at Section 167 as follows:

"In addition to the liens above-mentioned which belong to the general equitable jurisdiction, the legislation of many states has created or allowed other liens which often come within the equity jurisdiction in respect at least to their means of enforcement. The so-called mechanic's liens may be taken as the type and illustration of this class."

In full accord with the foregoing is *Gilchrist v. Railway Co.*, 58 Fed., 708, 710.

It is quite clear, therefore, that while a mechanic's lien is regulated by statute in Ohio, that its equitable character is not thereby destroyed. A legislature may, at will, create what might be termed "statutory proceedings," some of which have properly been held not appealable, but a legislature can not by such special or statutory proceeding destroy the right of appeal in a chancery case, and so it is indicated in the very recent case of *Manning v. Village of Lakewood et al*, 94 O. S., 85. This was a proceeding brought in the Court of Common Pleas of Cuyahoga County to enjoin the collection of certain special

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assessments alleged to have been levied by the village of Lakewood. Issue was joined, trial had, judgment entered, and an appeal taken to the court of appeals where, on motion, the appeal was dismissed because not appealable under the present Constitution of Ohio, and for the reason that the remedy is statutory. The Supreme Court reversed the court of appeals and among other things held that:

“The jurisdiction conferred by the statute to restrain the collection of illegally assessed taxes and assessments, being an equitable jurisdiction, to be exercised by the chancellor upon equitable principles, it follows that courts of appeals have appellate jurisdiction in the trial of such cases.”

The above case is quite similar to the one at bar; and still another in full accord with the foregoing, is *Improvement Co. v. Malone*, 78 O. S., 239. Attention is called to *Dunn & Witt v. Kammacher*, 26 O. S., 497, which was a proceeding under Section 5 of the former mechanic's lien law (S. & C., 834), which provided that the remedy should be “an action of money had and received” which made an issue triable by jury and is therefore not applicable in the instant case, and especially because said statute is no longer in force. It is, however, interesting to note that prior to the amendment of the Constitution of Ohio in A. D. 1912, it was twice held in this jurisdiction under favor of Section 5226, R. S., now Section 12224, G. C., that the right of appeal existed in an action to foreclose a mechanic's lien; it was so held Nov. 26, 1906, in *Jesionowski v. Wismiewski*, 21 C.C.(N.S.), 413, and May 17, 1909, in *Thompson v. Rosenberg et al*, 16 C.C.(N.S.), 341. These cases are interesting principally for the reason that they primarily recognize the equitable character of a proceeding to foreclose a lien even where personal judgment is sought also; and yet in the case at bar no personal judgment is sought, nor could it be in any event by *Eggar & Pierce* against the *Laughlins*, only the foreclosure of the lien, making the issue as against said *Laughlins* purely an equitable one, though regulated by statute. It would not be urged for a moment that any personal judgment could have been taken against the *Laughlins*.

It is contended however that the case of *Hollowell v. Schrader et al*, 26 C.C.(N.S.), 97, is decisive here. This case was decided July 14, 1916, and the syllabus reads as follows:

“An action to foreclose a mechanic’s lien is not cognizable in equity and therefore not appealable.”

This was by a divided court and on the 27th day of June, A. D. 1917, was reversed by the Supreme Court of Ohio without report, 96 O. S., 599, and since the only issue raised was the right of appeal in an action to foreclose a mechanic’s lien, the reversal of the cause determines that right.

The conclusion, therefore, is irresistible that while in Ohio, a mechanic’s lien is wholly a creature of statute, that the remedy is not exclusively legal but equitable as well. In view of all the foregoing it follows that the motion to dismiss the appeal must be overruled, which is done accordingly.

POLLOCK, J., and METCALFE, J., concur.

REDUCTION OF ALIMONY ALLOWANCE.

Court of Appeals for Hamilton County.

DORA BRUNER V. JOHN E. BRUNER ET AL.

Decided, April 29, 1918.

Alimony—Form of Application for Change in Allowance Immaterial, When—Presumption as to Action of the Court Below—Changed Conditions.

1. It is immaterial that the application for reduction of an allowance of alimony is made in the form of a motion rather than a petition, where the motion has been regularly filed and sets forth the grounds upon which a modification of the original order is asked.
2. At the hearing of such an application a presumption arises, in the absence of a bill of exceptions containing all of the evidence, that the court had before it evidence as to property out of which an allowance could be made and that the allowance was made in accordance with law.

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3. Changed conditions which justify a reduction of the original allowance may not justify a discontinuance of the allowance altogether.

Frank H. Kunkel, for plaintiff in error.

Alfred G. Allen and Lorbach & Garver, contra.

BY THE COURT.

Error to the Court of Insolvency of Hamilton County.

On February 19, 1910, a divorce was granted plaintiff in error, and a decree for alimony of sixty dollars per month payable monthly was allowed, which alimony was regularly paid.

On June 11, 1917, a motion was filed by defendant asking for a modification of the decree for alimony, setting forth changed conditions claimed to justify same together with an affidavit in support of said motion. On October 6, 1917, after the hearing of same said motion was sustained and a decree was entered terminating the payment of alimony. The petition in error here seeks to obtain a reversal of the order terminating the alimony.

It is urged by plaintiff in error that the question of modification could not be raised by motion but should be by petition only. We are of the opinion that the motion, having been regularly filed, setting forth the ground upon which the modification is asked and setting forth the changed conditions, is sufficient to give the court jurisdiction to hear and determine the question. The mere naming of the paper writing a "motion" instead of a "petition" could not deprive the court of such jurisdiction.

The question as to the amount of property owned by the defendant at the time of the granting of the divorce is not properly raised here. In the absence of a bill of exceptions containing the evidence introduced at the original hearing of the divorce case, this court will presume that the trial court had before it evidence of property out of which said court could order the allowance made at that time, and it will be presumed that it made the award in accordance with the law. *Lape v. Lape*, 28 O. C. A., 108.

The right to modify the decree for alimony would therefore rest upon the ground of changed conditions. We hold that the evidence shows such changed conditions as to justify the

lower court in sustaining the motion to modify the decree, but it does not justify the termination of the decree for alimony as a whole. The court would have been justified in reducing the alimony, under the changed conditions, to the payment of the amount of thirty dollars per month.

The judgment of the insolvency court will be modified and the payments of alimony continued from and after October 6, 1917, in the sum of thirty dollars per month, payable monthly.

JONES, P. J., and HAMILTON, J., concur.

**LIABILITY FOR PROPERTY DESTROYED BECAUSE INFECTED
WITH CONTAGIOUS DISEASE.**

Court of Appeals for Morrow County.

ADAM CLOUSE ET AL, AS THE BOARD OF HEALTH OF CANAAN
TOWNSHIP, MORROW COUNTY, v. JAMES COYKENDALL.

Decided, May Term, 1918.

Board of Health—Liability for Property Destroyed in Preventing the Spread of Contagious Disease—Necessary Allegations and Proof—Character of Property Which may be Destroyed—Failure to Separate Issues in Charge to Jury.

1. In an action against a board of health for the value of goods or property destroyed to prevent the spread of any contagious disease, it is necessary to both allege and prove by a preponderance of the testimony that the property destroyed was infected, and that it could not be made safe by disinfection, and that it was destroyed at the expiration of the quarantine period by the board of health, either individually or in accordance with orders issued by them.
2. Liability does not arise for property destroyed where it is of such a nature that it could have been cared for without permitting it to become infected.
3. Failure of a trial court to separate the issues of fact from the issues of law in its charge to the jury, and to properly define such issues, constitutes reversible error.

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POWELL, J.

The parties to this proceeding in error stand in the inverse order to that in which they stood in the court below; the plaintiffs in error were defendants in that court and the defendant in error was plaintiff.

The right to a recovery is based upon the provisions of Section 4434 of the General Code, providing for the care of persons afflicted with any contagious disease. The case presents two principal contentions, and we are asked to reverse the judgment of the court below upon such contentions:

First. The charge of the court is complained of. Whether or not it complies with the requirements of the statutes and decisions relating to court procedure. And—

Second. Whether or not a case which would entitle the plaintiff to recover is set out in the pleadings and proved by the evidence offered.

The petition, as it was said above, was based upon the provisions of Section 4434 of the General Code, which reads as follows:

“Section 4434. Such board may destroy any infected clothing, bedding, or other article which can not be made safe by disinfection, and shall furnish to the owner thereof a receipt, of which it shall keep a full and accurate copy, for articles destroyed, which receipt shall show the number, character, condition and estimated value of the articles destroyed.” * * *

This act is an attempted exercise of what is generally designated as the police power of the state, and is intended to protect the general public from the evils growing out of infectious or contagious diseases; it prescribes a plan of procedure and designates the tribunal to carry the plan into effect. This tribunal is the board of township trustees, who become by virtue of that office the board of health for so much of the township as lies outside of any municipality. Each municipality is supposed to have either a board of health or a health officer of its own, while the duties belonging to a board of health outside of such municipality are placed by statute upon the township trustees. This suit is based on the alleged action of the board of health in destroying cream of plaintiff of the value of \$70, and one

hundred dozen eggs of the value of \$30. There is a second cause of action set up in the petition by which plaintiff claims the sum of \$50 from the said defendants for care, boarding and nursing furnished one Flossie Waters, while quarantined in his house during the prevalence of the disease of small-pox, and for money paid for her doctor bill while so quarantined. It appears from the averments of the petition and the proof, that the said Flossie Waters was without means to care for herself or to pay her doctor bill, and that the care, nursing and boarding was furnished her by the plaintiff and that he paid her doctor bill while so quarantined. In the opinion of the court the second cause of action is well pleaded and sufficiently proved. The evidence, however, as we think, fails to sustain the first cause of action. There is no averment and no testimony of any sort, that the property destroyed was infected with small-pox, or that it could not be made safe by disinfection; neither is there any proof that the property was destroyed by the board of health individually, or under its direct order. In order to make a cause of action these things should both be alleged and proved by a preponderance of the evidence. The court is of opinion that the first cause of action is not sustained by sufficient proof.

The second contention insisted upon is that the court did not state the issues presented by the pleadings with that particularity required by law, and that as given the charge is misleading and for want of more particular statement is prejudicially erroneous.

On examination of the charge, the court is of the opinion that the same was incomplete in that it does not define to the jury what the issues to be tried really were, nor were they properly instructed as to the proof necessary to maintain such issues. We think such instruction as was given, was properly given, but that the application of the same to the issues was not made by the court in its charge to the jury. The Supreme Court has held that it is the imperative duty of the trial court to separate issues of fact from issues of law and define the same and that proper instructions be given as to the proof necessary to sustain any such issue so presented. In this case the issues are made up by a general denial of the averments of the

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petition. If the petition states a cause of action, it shows that the property alleged to have been destroyed :

First. Was infected with small-pox contagion.

Second. That it could not be made safe by disinfection; and

Third. That it was destroyed by the board of health, or under its orders.

Those constitute, as we think, three distinct issues to be presented to the jury and tried by them under proper instructions from the court. The court is of the opinion that because the first and second of these issues were not defined or stated to the jury separately in the general charge, the same was erroneous and misleading. *Railroad v. Lockwood*, 72 O. S., 586.

In addition to what is said above it seems to the court that an issue of law is presented by these pleadings, as to whether or not plaintiff was entitled to recover at all without showing that the property so claimed to be infected was destroyed by the board of health, or by its order, at the expiration of the time of quarantine, that being the time prescribed by law, when the infected property should be fumigated or destroyed. It appears by this record that when the quarantine card was first placed upon the residence of the plaintiff some conversation was had as to what should be done with the eggs and the cream; that the members of the board of health at that time said that it was unlawful to sell the same, but did not make any provision, however, that they should be cared for, or looked after by persons other than the plaintiff or his family, most of whom were during the time of quarantine afflicted with the disease of small-pox; and acting upon this advice the plaintiff fed the cream, or so much of it as was not needed for his own family use, and the eggs, to his hogs.

The court is of the opinion that it is not the intention of the law that property of this kind, that can be cared for without becoming infected, should be cared for otherwise than by being destroyed while it is accumulating; and then it is a question of doubt as to whether or not in such circumstances the board of health would be liable for the value thereof. This question

arises solely upon the weight of the evidence, as no question of this kind was made by the pleadings.

It was further said in argument that the verdict of the jury and the judgment ought to be sustained under the provisions of Section 11364 of the General Code, as the record shows that by such judgment substantial justice had been done. The provisions of this statute are often misapplied and a court can easily usurp the functions of the trial court and a jury, by simply certifying that substantial justice has been done. In a case like the one at bar, it is wholly the province of the jury to determine what is substantial justice between the parties on the acts presented. They must do this, however, on a fair and impartial trial under the rules of legal procedure. When this has been done the verdict ought to stand, or if the facts are practically agreed on the court may determine upon its own initiative that substantial justice has been done. We think on the record as presented in this case, that on the second cause of action substantial justice was done, and if it stood alone it would be affirmed upon that ground. But upon the first cause of action the court can not certify that substantial justice was done as between the plaintiff and the general public represented by the board of health.

For the reasons stated the court is of opinion that the judgment should be reversed and that the cause should be remanded to the court of common pleas for a new trial and such other proceedings as are authorized by law.

Judgment reversed.

HOUCK, J., and SHIELDS, J., concur.

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**RECOVERY FROM PULLMAN COMPANY OF MONEY TAKEN
FROM BERTH.**

Court of Appeals for Hamilton County.

THE PULLMAN COMPANY V. HENRY W. ROOS.

Decided, November 19, 1917.

*Sleeping Car Companies—Nature of the Contract Entered Into with
Passengers—High Degree of Care Required in Protection of Pas-
sengers—Company Liable for Money Taken by a Porter.*

1. While a claim against the Pullman company for money stolen from the berth occupied by a passenger might be prosecuted as for tort, a petition which sets up the contractual relation which by implication follows the purchase by an intending passenger of a ticket from an agent of the Pullman company makes the claim one arising upon contract and brings it under the six year statute of limitations.
2. Where money belonging to a passenger occupying a Pullman berth, was wrongfully taken from the berth by a porter while he was engaged in making up the berth. *Held:* That such act was done by the porter while acting within the scope of his employment.
3. A finding by the jury that \$190 was a reasonable sum for the plaintiff to take with him, for the expenses of a trip by himself and his wife from Cincinnati to New York and return, was justified.

Mortimer Matthews, for plaintiff in error.

Harry H. Friedman and *Jacob S. Hermann*, contra.

HAMILTON, J.

Error to the Superior Court of Cincinnati.

The plaintiff below, defendant in error here, recovered a judgment against the defendant, the Pullman Company, on account of the loss of a sum of money amounting to \$190 alleged to have been taken by the porter on a car of the Pullman Company from a berth which was or had been occupied by the plaintiff and his wife at or immediately preceding the time that the money was taken. After reciting the corporate power of the Pullman Com-

pany and the nature of its business the amended petition contains the following allegations:

"Plaintiff further says that on or about May 12th, 1911, he boarded a sleeping car belonging to, operated and maintained by the defendant company in the city of Cincinnati, and for a valuable consideration paid by him to the defendant company, he was provided with a seat known as lower berth number twelve for the purpose of occupancy and slumber during plaintiff's journey from the city of Cincinnati, Ohio to the city of New York, state of New York, and that said sleeping car was known as car number two and was attached to train number two operated by the Pennsylvania Railroad Company and that plaintiff, during said journey used and occupied said berth known as berth number twelve in said car as aforesaid.

"Plaintiff further says that defendant was guilty of a breach of its contract with plaintiff in that it carelessly and negligently failed to guard said berth and car while he was riding thereon. Plaintiff further says that defendant failed and neglected to provide proper, honest, trustworthy and careful employees on said car to perform the services required of it in the discharge of its contract with plaintiff.

"Plaintiff further says that by reason of the payment of said valuable consideration defendant agreed and undertook to allow plaintiff and his wife to use lower berth number twelve on said car for the purpose of occupancy and slumber; that among the servants and employees provided by the defendant, to perform its contract with plaintiff in making up the berth for the use of plaintiff and his wife during the night, and to replace the bedding of said berth and restore the same in condition for day travel, was a servant and employee of said company designated and known as the porter. That on or about May 12, 1911, the porter on said car did convert said seat into a berth, and that on or about the 13th day of May, 1911, replaced the bedding in said berth and restored it to a seat for day travel, and that while engaged in his duties of replacing said bedding and restoring said berth as aforesaid, said porter, while acting as aforesaid in the course of his employment, did wrongfully and unlawfully take and convert to his own use, from a pillow lying in said berth the sum of one hundred and ninety (\$190) dollars which was the property of the plaintiff and which plaintiff had taken with him on said journey to use for reasonable traveling expenses."

Following the above allegations is a prayer for judgment for the sum of \$190 with interest.

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The defendant challenged the sufficiency of the amended petition both by demurrer and answer, urging the proposition that the claim was one for tort and was barred in four years under the statute.

We can not agree with this proposition. While the plaintiff could undoubtedly have prosecuted this action as for tort, he does not do so, but sets up the contractual relation which impliedly follows the purchase by a passenger of a ticket and the sale to him of a ticket by the company's agent as set forth in the petition. That such an implied contract arises from this transaction there can be no doubt.

Elliott on Railroads, Volume 4, Section 1618, lays down the following principle of law:

"The nature of the services rendered by sleeping car companies is public, and they are in some measure instrumentalities of interstate commerce, and hence considerations of public policy have weight in determining what their obligations are and the general character of their duties. We think that principle requires the conclusion that in all matters peculiar to sleeping cars, and their appurtenances, a sleeping car company owes to those with whom it contracts a special and distinct duty."

And in *Lewis v. New York Sleeping Car Co.*, 143 Mass., 267, on page 272, we find the following language in the opinion of the court:

"When a person buys the right to the use of a berth in a sleeping car, it is entirely clear that the ticket which he receives is not intended to, and does not, express all the terms of the contract into which he enters. Such ticket, like the ordinary railroad ticket, is little more than a symbol intended to show to the agents in charge of the car that the passenger has entered into a contract with the company owning the car, by which he is entitled to passage in the car named on the ticket.

"Ordinarily the only communication between the parties is, that the passenger buys, and the agent of the car company sells, a ticket between two points; but the contract thereby entered into is implied from the nature and usage of the employment of the company."

This we think to be the law, and this view is supported by abundant authority. While some of the allegations of the

amended petition sound in tort, yet considering the amended petition as a whole we think it is sufficient to support the claim as arising on contract and therefore coming within the six year limitation under the statute. And further construing the amended petition as supporting a claim arising on contract we also find that a breach of the contract is sufficiently alleged.

It therefore follows that the amended petition stated a good cause of action and the demurrer was properly overruled; and the court did not err in sustaining the demurrer to this ground of defense in the answer.

It is contended by plaintiff in error that there was no evidence that the theft of the money was within the scope or authority of the porter.

In the case of *Bonser v. Pullman Co.*, 19 C.C.(N.S.), 266, this court held:

“A sleeping-car company is not an insurer of the safety of property belonging to its passengers, although held to a high degree of care in its protection.”

Under this rule it was the duty of the company to employ competent and trustworthy employees and to exercise a high degree of care in the protection of the defendant in error and his property. The evidence discloses that the wife of defendant in error pinned the money in the pillow and placed it by the wall on the inside of the berth occupied by defendant in error and herself; that the money was taken from this pillow while the husband and wife were in the dressing rooms of the Pullman car; that the porter made up the berth while they were dressing, and the wife upon her return to the berth immediately discovered the loss. The only rational conclusion is that if the porter took the money he took it while engaged in making up the berth, and making up the berth was one of the very things for which he was employed, and the theft—if by the porter—having occurred while he was making up the berth, it must be held that it was done in the course of his employment.

On this proposition the case at bar presents a much stronger case than many of the authorities cited in the briefs of counsel.

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As to whether or not the porter took the money, was a question for the jury, and under an examination of the evidence we are unwilling to disturb the judgment as being manifestly against the weight of the evidence.

Defendant in error further complains of the charge of the court to the effect that the plaintiff might recover such a sum as the jury upon the evidence should find to have been a reasonable sum to be carried by the plaintiff in view of the journey that was being undertaken by him, on the ground that there was no evidence tending to show what such a reasonable sum would be. In our opinion the jury were fully justified in finding that the sum of \$190 for the defendant in error to carry with him for expenses on a trip of himself and wife from Cincinnati to New York, was not an excessive sum.

Finding no prejudicial error in the record, the judgment is affirmed.

JONES, P. J., and GORMAN, J., concur.

**WHEN TITLE TO LAND VESTS WHERE DEVISED SUBJECT
TO A LIFE ESTATE,**

Court of Appeals for Perry County.

**MARGARET HAMMOND v. VINCENT A. HAMMOND and
EDWARD HAMMOND.***

Decided, April Term, 1918.

Descent—Determination of the Rights of the Relict of a Devisee Whose Death Preceded that of the Life Tenant—Section 8573.

Lands were devised to three brothers, subject to the life estate of their mother. Prior to the death of the mother one of the brothers died intestate and without issue. The life estate having been terminated by the death of the mother, the present action in partition was brought, and an issue raised as to the rights of the widow of the deceased brother.

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court October 8, 1918.

Held: That a fee simple vested in the three sons at the death of the testator, subject to the life estate of their mother. A one-third interest in said lands descended, therefore, to the deceased son as ancestral property, out of which his widow took a life estate, and is entitled to an accounting for rents and profits from the date of the death of the previous life tenant. If the interest of the said widow can be set off by metes and bounds without depreciating the value of the remainder of the land, she is entitled to partition; but no sale of said land can be made without the consent of all parties in interest.

Martin & Martin and Tague & Tague, for plaintiff.

John W. Dugan, H. D. Cochran and T. B. Williams, contra.

POWELL, J.

This is an action in partition, and is in this court on appeal from the judgment of the court of common pleas. The lands sought to be aparted are described in the petition, and the case is submitted on an agreed statement of facts. The plaintiff is the widow of Henry Hammond, who died intestate and without issue. The defendants are the brothers of the said Henry Hammond. The common source of title is Robert Hammond, the father of said Henry Hammond, Vincient A. Hammond and Edward Hammond. The defendants and Henry Hammond were devisees under the will of Robert Hammond in equal shares. The will of Robert Hammond gave to his wife, Mary A. Hammond, an estate for life in all his property, real and personal, with power and authority to sell the whole, or any part thereof if necessary for her comfortable maintenance and support. This power of sale was never exercised by Mary A. Hammond, and has no part in the questions for solution in this action, and the same will not be again referred to in this opinion.

Under the will of Robert Hammond, deceased, Mary A. Hammond had only a life estate in the lands sought to be partitioned. *Johnson v. Johnson*, 51 Ohio St., 446.

The fee simple title vested at once on the death of Robert Hammond in his three sons as devisees under his will, but subject to the life estate of Mary A. Hammond therein. While the

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title was thus vested Henry died intestate and without issue. How did his share in said lands descend? Margaret, his widow claims that it descends from him as ancestral property, under the provisions of Section 8573 of the General Code; and there being no children or legal representatives of children, the same passes to and is vested in her as the widow, relict of said decedent for and during her natural life, and that, by operation of the same statute, on the termination of her life estate the real estate passes to and vests in the defendants, Vincent A. Hammond and Edward Hammond, brothers of said Henry Hammond and of the blood of Robert Hammond, the ancestor from whom the estate came.

We are of the opinion that this claim is right and that the same is based on the correct interpretation of the statutes of descent.

Defendants contend that because Henry died before his mother, the life tenant, he never was seized of an estate in said lands or any part thereof. The infirmity in this contention is that it is in conflict with the holdings of the courts of Ohio in similar cases, and which holdings have determined the law so far as the state of Ohio is concerned. *Johnson v. Johnson*, 51 Ohio St., 446, and many other authorities.

Henry Hammond took a *vested estate* under the will of his father. It was subject to defeasance, on certain conditions named. These conditions never happened, and his estate became absolute, either in him or in his heir at law, on the death of his mother, without having sold the property for her support. A *vested estate* always descends to the heir designated by the law. It may be burdened with conditions, but nevertheless, until these conditions defeat the estate, the right to it, the title passes by the statute of descents.

The cases cited by defendants are not applicable to the case under discussion. They relate especially to certain common law incidents that attach to dower estates and estates by the curtesy. These estates at common law, or on statutes declarative of the common law are based on the right to possession only, and where there was no possession nor right of possession in the

deceased consort, there was no dower or curtesy. This has all been changed by statute. Curtesy has been abolished, and a statutory dower right substituted in its stead. And the dower right of widows has been broadened and extended so as to include as lands subject to dower "all the real property of which the deceased consort, at decease, held the fee simple *in reversion or remainder*, and in one-third of all the title or interest that the deceased consort had, at decease, in any real property held by article, bond or other evidence of claim." Section 8606, General Code.

Plaintiff is entitled, on the agreed statement of facts, to a life estate in one-third of the real estate described in the petition, and to an accounting from the defendants for rents and profits, from the date of the death of Mary A. Hammond, deceased, when said life estate accrued to her.

We think also that she is entitled to an order of partition, provided her interest in said lands can be set off to her by metes and bounds, without injury to the value of the said lands, but that no sale of said premises can be had without the consent of all the parties owning an interest in the same.

A decree may be entered as prayed for in accordance with the views expressed in this opinion, and a writ of partition may issue to set off to plaintiff her interest in said real estate by metes and bounds, if the same can be done, but if not, then that such other proceedings may be had in the premises, as are authorized by law. It is also ordered that a special mandate issue to the court of common pleas to carry this judgment into effect.

HOUCK, J., and SHIELDS, J., concur.

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**MARKETABLE CHARACTER OF TITLE OBTAINED BY PURCHASER
AT A SALE IN FORECLOSURE.**

Court of Appeals for Hamilton County.

WALTER V. SCOTT.*

Decided, March 14, 1914.

Foreclosure—Character of Title Acquired at Judicial Sale—Evidence of Satisfaction of the Mortgage—Failure to Use the Word "Heirs" in the Habendum Clause.

1. When property is sold in a judicial proceeding the sale vests title in the purchaser free from all rights of all parties to the action.
2. When a foreclosure suit is pending any rights obtained by a mortgagee under a mortgage made by defendant on the real estate involved in such foreclosure suit would, under the doctrine of *lis pendens*, be dependent upon the result of the foreclosure suit, and a sale afterwards had thereunder would vest the title entirely free from any lien because of such mortgage.
3. The statutory provision for the cancellation of mortgages satisfied by foreclosure proceedings, by an entry on the record thereof by the clerk of the court, is merely directory, and such an entry is not an essential one to effect a complete satisfaction of the mortgage or to remove it as a cloud upon the title when a proper foreclosure sale has been had.
4. Where a deed by a master commissioner to a trustee recites that the master commissioner was ordered by the court to convey the title in fee simple, and where it was the duty of the master commissioner to execute a conveyance of a fee simple estate, the heirs of the original owner are estopped from setting up any claim as against the purchaser, although the deed failed to use the word "heirs" in either the granting or *habendum* clause, to indicate a perpetuity, and instead used the word "successors," and such deed will be held to convey a fee simple title.

Eltzroth & Maple, for plaintiff in error.

Hicks & Hicks, contra.

JONES (Oliver B.), J.

This was an action below to compel the specific performance of

*Affirming *Scott v. Walker*, 15 N.P.(N.S.), 208.

a contract for the purchase of real estate. Defendant refused to accept a deed and pay the purchase price, contending that the title of plaintiff to the property was "defective, unmarketable and not good."

On careful consideration of the pleadings there appears to be no issue raised between the parties on the facts, and they seem to agree in all matters as to the state of the records relating to plaintiff's title, and to differ only as to the law and the legal effect of these records.

A demurrer to the reply was filed by defendant, and a motion for judgment on the pleadings was filed by plaintiff. This demurrer and motion were heard together by the court. The demurrer was overruled, and the motion for judgment was granted and judgment entered for plaintiff. The journal entry overruling the demurrer to the reply uses these words as preliminary to the judgment, "The defendant not desiring to plead further," as though some further pleading might be expected from defendant. Any new matter alleged in the reply is deemed to be controverted without any further pleading from defendant. (Section 11329, General Code.) If any distinct issue of fact was raised by the pleadings it would require the introduction of testimony by plaintiff to maintain such issue upon her part to entitle her to judgment, and it would be error to enter judgment on the pleadings without the necessary evidence. But, as we have stated, the parties seem to have agreed upon the facts at the hearing below, and the trial court has so treated it, as shown in the opinion, which is reported in 15 N.P.(N.S.), 208. The deeds upon which plaintiff's title rests, the sufficiency of which are disputed by defendant, while not embodied in the bill of exceptions are found with the papers, and, if they can be considered, show that there can be no dispute as to the facts.

If we are wrong in this assumption, and the defendant makes any dispute as to essential facts, then she would be entitled to a new trial. From the argument before us, however, we understand that counsel on both sides are agreed as to the facts, and therefore we proceed to consider the law.

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The duty of the court is fairly set out in the three propositions of the syllabus in *City of Tiffin v. Shawhan*, 43 Ohio St., 178, as follows:

“1. The duty of a court of equity to decree specific performance of a contract to convey real estate, can not be determined by any fixed rule, but depends upon the peculiar facts and equitable considerations of each case, and rests in the sound discretion of the court, guided and regulated, however, in the exercise of that discretion, as far as may be, by precedent and established practice.

“2. If a contract for the purchase and conveyance of land is in all respects fair and free from ambiguity, and its enforcement as against the purchaser will vest in him a marketable title, the court has no legal discretion to refuse its enforcement.

“3. If the specific performance of such a contract would be harsh, oppressive, or inequitable in its consequences, or would leave the purchaser with a doubtful and unmarketable title, the court, in the exercise of its discretion, will refuse to decree its performance, as no man will be compelled to accept a doubtful title.”

The question for the court to determine, therefore, is whether or not the title offered by plaintiff is a marketable title.

The objections made to plaintiff's title are that there are five mortgages on same, recorded in 1875 and 1876, made by P. W. Hill who was then the owner, and that they have never been cancelled of record.

It appears from the recital of two deeds, made by P. W. Hill, per master commissioner, under which plaintiff claims, that a proceeding was had in the common pleas court against said Hill, in which the owners of four of these mortgages were parties, and under which said four mortgages were foreclosed, and a sale of said premises was had and confirmed by said court and the master commissioner was ordered to convey the premises so sold to the respective purchasers in fee simple.

The record of this foreclosure proceeding in the common pleas court was destroyed by the courthouse fire of 1884, and the only evidence of same now of record is contained in the master commissioner's deeds, which by virtue of Section 12349, General

Code, are *prima facie* evidence of the legality and regularity of such sale and of the correctness of the proceedings in the action or proceeding.

If anything further is necessary to validate the title to said lands in the purchaser under said sale, it is found in Section 15091-1, General Code (102 O. L., 460), which is as follows:

“That in all cases where there shall exist any defect in the record of the title to any of the lands in any county, in the state of Ohio, which defect is due to the total or partial destruction of a deed, plat or court record of such county by fire, riot or civil commotion, and more than twenty-one years have elapsed since such total or partial destruction, the title to any such lands is hereby made valid in the owner thereof as against any defect in the record of the title thereto, resulting from such total or partial destruction of the deed, plat or court record of said county, by such fire, riot or civil commotion, provided, that nothing herein contained shall affect litigation now pending in any of the courts of this state, and any person or persons adversely claiming title thereto, shall begin proceedings within one year from the taking effect of this act, if not already barred by limitation or otherwise.”

It must be conceded that the sale of these premises in foreclosure carried with it all the interests of all the parties to the suit. It is an elementary proposition that when property is sold in a judicial proceeding the sale vests title in the purchaser free from all rights of all parties to the action. *Lessee of Fosdick v. Risk*, 15 Ohio, 844, and *Freeby v. Tupper et al*, *Id.*, 468.

The first four mortgages made by Hill must therefore be deemed satisfied.

When the fifth mortgage, to one Henderson, was made by Hill, this foreclosure suit had been pending more than nine months, and any rights obtained by Henderson under this mortgage would, under the doctrine of *lis pendens*, be dependent upon the result of the foreclosure suit. The sale afterwards had thereunder would vest the title entirely free from any lien because of the mortgage to Henderson. *Heirs of Ludlow v. Kidd's Exrs.*, 3 Ohio, 541, and *Bennet's Lessee v. Williams*, 5 Ohio, 461.

It is contended, however, by counsel for defendant, that Section 8552, General Code, provides for the cancellation of the

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mortgages satisfied by the foreclosure proceeding by an entry on the record thereof by the clerk of the court. This section is merely directory. Such an entry is in effect simply a reference to the court proceedings, and while it should be observed, because it is a great convenience to examiners of the records, it is not an essential one to effect a complete satisfaction of the mortgage or to remove it as a cloud upon the title when a proper foreclosure sale has been had. If it is desired as a matter of reference, no doubt an order could even now be obtained from the common pleas court, under the foreclosure case, for the clerk to make such entry on the record of the mortgages included in the foreclosure. The further fact that all of said five mortgages has been past due for more than thirty years, without effort on the part of the mortgagees to assert any claim thereunder, would in itself indicate that they no longer constitute a cloud upon the title.

The most serious question, however, is raised by the defective character of one of the master commissioner's deeds—the deed to William J. Littell, trustee for the Wildey Building Association, for part of said premises. This deed failed to use the word “heirs” in either the granting or *habendum* clause, to indicate a perpetuity, and instead used the word “successors” as though the grant were made to the building association instead of to Littell, trustee.

There can be no dispute that the general rule in Ohio, as a common law, is that the word “heirs” or other appropriate words of perpetuity should be used to pass the fee simple estate; and that the omission of such word in a deed to a natural person in the granting and *habendum* clauses vests only a life estate in the grantee. (*Ford v. Johnson*, 41 Ohio St., 366.) There are, however, well established exceptions to this rule: *Railway v. Bosworth*, 46 Ohio St., 81, 85, where the grant was to a corporation aggregate and was sustained as carrying a fee without the use of the word “heirs” or “successors;” and *Brown v. National Bank*, 44 Ohio St., 269, 276, where a mortgage made on an *Indiana* form without the use of the word “heirs,” conveying Ohio real estate, was construed to pass an estate in fee simple. An exception has also been held where the conveyance is made

to a trustee where the nature of the trust would require that the legal estate conveyed be one in fee simple. *Young v. Bradley*, 101 U. S., 782, 785; *Young v. Commissioners of Mahoning County*, 53 Fed. Rep., 895, 899, and *Williams v. Mears*, 2 Disney, 604, 616.

In the deed under consideration it is recited that the master commissioner was ordered by the court to convey this title in fee simple. The title held by Philip W. Hill, the mortgagor, was a title in fee simple, and under Sections 11693 and 11694, General Code, it was the duty of the master commissioner to execute such a conveyance of the estate as would convey the interest of P. W. Hill as it existed at the time of the sale, or was acquired thereafter, and vest such estate in the purchaser. If the master commissioner had failed to execute any deed, it could still no doubt under the order of the court have been executed by the sheriff. And if a defective deed were executed it could be corrected by the master, or a new and proper deed could be executed to take its place.

Giving to the contention of the defendant below its full weight and conceding for the purpose of argument that this deed did only convey a life estate, then where would the remainder of said title have vested? Clearly, in the original mortgagor or his heirs. But he had conveyed it by these mortgages in fee simple, and his fee simple title was ordered sold in the foreclosure proceeding, and his heirs are therefore estopped from setting up any claim as against the purchaser. There could be no claim by Hill or his heirs as against this deed.

It will therefore be seen that the only possible claims that could be made against plaintiff's title, because of the defects set up by defendant, would be claims under the four mortgages which had been foreclosed and the one mortgage which was made during the pendency of the foreclosure proceedings, and the claim which defendant urges might be made by an owner of the fee against whom the fee simple title had been ordered sold, who, defendant claims, might be entitled to an interest in the remainder because of the form of conveyance executed to the purchaser under the foreclosure sale. We have seen that out-

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side of the statute of limitations, which itself would probably prevent any such claim, no such claims could possibly be successfully maintained. And while a court should refuse to compel a purchaser to accept a doubtful title, which might expose him to litigation, even though he might be successful in such litigation, we find that this is not such a title, but that it is a valid and marketable title.

In the state of the records in this county, because of the courthouse fire, it is probable that there are but very few titles that are perfect on the records in all respects; and, while an examiner of titles might desire to have every possible obstacle removed, we can not hold that such defects as are urged against plaintiff's title here render it unmarketable, as there is no probability of any effort to assert a claim against it.

It is not necessary to further discuss the questions raised, because a full discussion is given in the able opinion of the court below, which seems to cover the entire ground.

Judgment is therefore affirmed.

SWING, J., and JONES (E. H.), J., concur.

**STATE NOT A PARTY IN INTEREST UNDER A BOND FOR
APPEARANCE RUNNING TO CITY.**

Court of Appeals for Cuyahoga County.

LILLISTON ET AL V. STATE OF OHIO.

Decided, June 1, 1917.

*Forfeited Recognizance—Action on, Where Running to a Municipality
—Improperly Brought in Name of the State.*

The state of Ohio is not "the real party in interest" in an action on a forfeited recognizance running to the city of Cleveland, taken in a prosecution in the municipal court of such city under a city ordinance.

G. W. Gurney, for plaintiff in error.

Samuel Doerfler, Prosecuting Attorney, contra.

METCALFE, J.

The plaintiff in error, Eva Lilliston, was arrested by an officer of the Cleveland police department, and under a city ordinance an affidavit was filed against her in the municipal court charging her with street soliciting.

Thereupon she appeared before the clerk of said court, with plaintiff in error G. W. Gurney, and entered into a recognizance for her appearance, the bond running to the city of Cleveland. The plaintiff in error, Eva Lilliston, failed to appear at the time set for trial and the recognizance was forfeited.

This action is brought in the name of the state of Ohio to recover the penalty. The question here is, can an action be maintained in the name of the state of Ohio on a recognizance running to the city of Cleveland taken in a prosecution in the municipal court of said city under a municipal ordinance?

We are clear that such action can not be maintained in the name of the state. The case cited in the brief of counsel for defendant in error as *Chandler v. Commissioners*, 2 Dec. Re., 112, does not apply. In that case the prosecution was under a state law and the bond was taken in the name of the state of Ohio. Of course, in a prosecution under the law of the state, in a state court, the recognizance would run to the state of Ohio, and the state of Ohio would be the real party in interest in an action to recover the penalty of the bond. Here, however, the case is different. The prosecution was under a municipal ordinance in municipal court and the bond ran to the city of Cleveland.

Before the state can maintain an action on such a bond it would have to show either a statutory right or that it had in some way acquired the interest of the city.

The petition in this case does not show a cause of action in favor of the plaintiff, the defect would not be waived by a failure to demur, and a judgment on such a petition would be void. *Weidner et al v. Rankin et al*, 26 Ohio St., 522, and *Spoors v. Coen*, 44 Ohio St., 497.

The judgment is reversed.

POLLOCK, J., and FARR, J., concur.

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**PROSECUTION FOR ADULTERY BASED ON ALLEGED PREVIOUS
COMMON LAW MARRIAGE.**

Court of Appeals for Summit County.

MARC F. CHARRIER v. STATE OF OHIO.

Decided, November, 1918.

*Validity of a Marriage—Determined by the Lex Loci where Contracted—
Common Law Marriage Not Recognized in France—Parties Thereto
Not Subject to Prosecution for Adultery—Upon Contracting Valid
Marriages in Ohio.*

One who has entered the marriage relation in due form in Ohio is not amenable to a charge of adultery, where based on a showing of previous relations with a woman in France, meretricious in that country, but which in Ohio would be treated as a common law marriage.

Smyer & Clinedinst and W. H. Webb, for plaintiff.

W. A. Spencer, Prosecuting Attorney, contra.

GRANT, J.

Error to the Court of Common Pleas.

The plaintiff in error—hereinafter to be designated as the accused—is a native and citizen of France.

He was arrested, prosecuted and convicted in the probate court of this county for cohabiting with a woman not his wife—constituting, if the charge was made out, the offense, under our statute, of adultery. He was tried, with his consent, by the court without a jury. His motion for a new trial having been overruled and sentence passed upon him, he prosecuted error proceedings in the court of common pleas, which thereupon affirmed the judgment. To reverse that affirmance is the prayer of this petition in error.

The accused offered no evidence at the trial, his claim being that the state had not proved its case sufficiently to work his conviction under law. And such is still his contention here.

The facts material to the present question, as disclosed by the record before us, are these, for substance:

The accused has been domiciled in the United States for some two years. In 1917, in Ohio, in due form of its law, he contracted a marriage with the woman charged in the information as being his paramour in the alleged adulterous commerce.

It is the claim of the state that this relation, although entered into under the forms of lawful wedlock, is in fact meretricious, because the accused had before cohabited in France with another woman, under such circumstances and holdings out as would constitute a so-called common law marriage, as that term is understood and allowed in the courts of many states of our union, including Ohio.

The other woman was the prosecuting witness at the trial of this case. Her name of origin was Valentine Biguet. She seems to have first crossed the path of the accused in Paris, in April of 1905. Their meretricious relations appear to have commenced at once, but Charrier—so she says—then told her “he wouldn’t marry her right away,” for reasons he gave; his words of promise at that time were not *verba in presenti*, but related wholly to the future. In July of the same year she testifies that he said to her: “You are my wife *now*, and your daughter Collette is my daughter.” It seems that Collette, although so denominated, really had a decollete origin. The facts disclosed show that the prosecutrix was at the time she “took up” with the accused already the derelict mistress of the Baron de Cool, according to her story. This man turned out to be a misnomer at both ends of his name. He was not barren, for she says he begat Collette, and by the same token he could not at that time have been cool, although later he appears to have cooled off.

The statement that Charrier made to the effect that the girl was his daughter, had regard, as is said, to his intention to adopt her—she being then as to status only one of what, as “the divine Sara” Bernhardt said in her own case, are “the accidents of love.” As to patronymic, Collette went, and for aught that appears, still goes, by the name of her mother—Biguet.

In July, 1905, the claimant says, when Charrier began to call her his wife, she accepted the title by beginning to call him husband; and thenceforth she says he and she by mutual con-

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sent were held out to the world in which they moved as sustaining that relation. A child was born to them. The Baron, during several years, appears to have been a sort of meal-ticket for the two. He contributed sums of money at intervals, at the instance of the woman, who was undoubtedly instigated in this respect by the accused; as late as 1911, he sent her a thousand francs at one time and this appears to have been a wind-up of that illicit commerce. The woman says that at no time did she expect the baron would marry her; he "was too rich," she explains.

The money so contributed by the unbarren baron was used, as the woman claims, in the common family fund in part, and a part went to pay Charrier's debts—he being in a state of chronic impecuniosity, according to her.

In 1913, the pair emigrated to Canada, settling upon a farm in New Brunswick. On the ship they occupied the same cabin and on shore the hotel bills were rendered to, and paid by the accused, the woman being named in them as his wife and the children as his children. In all these years she says he was promising her to have the marriage solemnized according to the rites of the faith to which they adhered, but put off the fulfillment upon the excuse of financial impotence. In 1915 he abandoned her, or at least came to the United States, where in 1917 he contracted the formal marriage already related.

The claim of the prosecuting witness that during her cohabitation with the accused she considered herself as his lawful wife, or that such a thing as a common-law marriage existed between them, is somewhat shaken by her own admissions. It appears that upon the birth of the second child the certificate issued from the mayor's office at Paris was to the effect that the child had been given the mother's maiden name and that the father was unknown.

This, she explains, was because of illness she was unable to attend to the matter herself, and that the data upon which the certificate as made were furnished by her mother and sister; they evidently did not understand that she was a married woman.

It is in evidence also, that she took leases, paid taxes and gave receipts in her name of origin. At one time she effected an insurance on 6000 francs worth of furniture and other chattels,

which the not infertile baron had furnished, in the same name of Biguet.

She accounts for these signatures by saying that Charrier had gotten into trouble by biting a door-man and they were fearing a damage suit, or a fine, thereupon—just which, is uncertain.

Such are the controlling facts disclosed by the record before us. The question thence arising is—did the trial court apply to them the law in its judgment of conviction?

Measured by the probable intent of the parties at the time when the claimed common-law marriage is said to have been contracted, it is, in our view, extremely doubtful whether that relation is made out by the evidence; the fact that there was such a thing as a common-law marriage, or even a common law, probably was not known to either of them prior to their coming to the United States; the claim is clearly an afterthought.

From this it may be argued that, in an accusation of crime, the accused is entitled to the benefit of the doubt and so should go acquit.

But we are not inclined to acquiesce in that conclusion. If, wittingly or ignorantly, the parties by life and conduct brought themselves within the rule whereby a common-law marriage is established, or is necessarily to be inferred, we think the marriage status may be said to be the result. Favoring the judgment attacked, we hold that there is sufficient evidence in this record to justify the inference of a marriage at common law, as that relation is recognized by the courts of Ohio, so far as the form is concerned.

We reach this conclusion upon the following considerations: Marriage, in contemplation of present time law is a civil contract—nothing more. It is a peculiar contract and has elements not shared by ordinary contracts. It gives rise to an annexed social status. In theory at least, it is an irrevocable, a perpetual contract. It can be entered into only between persons of opposite sexes and it can not be entered into by persons within certain prohibited degrees of consanguinity.

But these are only incidents, imposed by considerations of necessity or public morals or policy. Aside from them, the con-

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tract of marriage involves only a meeting of the minds—which may be inferred from the conduct and acts of the contracting parties—and the execution of the agreement by cohabitation. Unless others are imposed by positive law, these are the sufficient ingredients to constitute the relation. And where others are so imposed, the want of them will not exclude the common law form, in countries where that law prevails, unless the statute in terms takes away the common law right. The presumption always is that the Legislature had no such intent. The statute regulates the mode of entering into the contract; it does not confer the right to make it.

From very ancient times—in fact from the introduction of Christianity in England, in the year 605 of our era—the canon law which was brought in with Christianity was adopted and practiced, universally—so universally that it became a part of the common law of England and was probably as venerable as any other part of that law. In *Crump v. Morgan*, 40 Am. Dec., 447, the court said:

“It is a mistake to say, that the canon and civil laws, as administered in the ecclesiastical courts of England, are not parts of the common law. Judge Blackstone, following Lord Hale, classes them as among the unwritten laws of England and as parts of the common law, which, by custom, has been adopted and has its own peculiar jurisdiction.” 1 Blacks. Com., 79; Hale’s History of Laws, 27-32.

The canon law, thus grafted upon the common law, was evidenced by various decrees of the Popes and ecclesiastical councils. It never required any validation of marriage by way of ceremony or religious sacrament, from the time it became the common law till the Council of Trent, in 1563.

Whether in England or on the continent, by the canon law clandestine marriages, without ceremony, while they might subject the delinquents to the censures of the Church, were nevertheless regarded as valid and were pronounced by the Council of Trent to be “*vera matrimonia*.” But that famous council, by its decree of November 11, 1563, changed the canon law and made null every marriage not celebrated before the parish or other priest, or by license of the ordinary, and before two or three

witnesses. Pursuing this line of inquiry, the court, in *Hallett et al v. Collins*, 10 How., 174, said:

“But it was not within the power of an ecclesiastical decree, *proprio vigore*, to affect the status or civil relations of persons. These could only be affected by the supreme civil power. The church might punish by her censures those who disregarded her ordinances; but, until the decree of the council was adopted and confirmed by the civil power, the offspring of a clandestine marriage, which was ecclesiastically void, would be held as canonically legitimate.”

In England, of course, this decree was never “adopted and confirmed by the civil power.” Before that time Henry the Eighth of England, in his many efforts to be re-wived, had found it convenient to cast off, for his Kingdom, the authority of the See of Rome, and Elizabeth, the fruit of one of his re-wivals, had no appetite to recognize the decrees of a church which had denounced herself as a bastard and both her father and herself as heretics, so it may safely be said that neither “’Andsome ’Arry” nor “redheaded Liz.” as certain uncharitable people have called them, allowed any Council of Trent to interfere with the institution of English marriage as then by English law established. The common law marriage continued to be allowed and recognized in that country until, at the time of our own separation from it, it became our common law instead of that of England. In England it so continued until the house of Lords, by a tie vote in 1843, in *Queen v. Millis*, 10 Cl. and F., 534, the validity of a common law marriage was denied by reason of the marriage act. The judgment in that case, however, was never drawn in precedent in this country, and its doctrine has been expressly rejected by the courts of Canada; in fact the marriage disallowed by the judgment in that case, was not an English marriage at all, but an Irish marriage. In England the common law doctrine had already been abrogated by Lord Hardwicke’s Act—36 Geo. II, and 4 Geo. IV—which required publication of banns or an obtained license, as the conditions of a valid marriage in England. But Lord Hardwicke’s act never applied to the English colonies and we never inherited that, and before the time of the Fourth George we were an independent nation.

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It follows that the common law marriage institution, brought from England by our ancestors, has full standing in the courts of such of the United States today as have not denied it by statute.

We are next to consider whether that law is to be allowed to fix the status of the accused and the prosecuting witness, or not. Otherwise stated, the inquiry is as to whether the common law, as it exists here in this respect, obtained in France, where the marriage was contracted, if at all, or in New Brunswick, where the status established in France, if at all, continued or was resumed. Marriage being a civil contract, is to be governed by the law of the place where it was made; this, we suppose, is not a matter of dispute.

Shall we, then, indulge the presumption that the law of the domicile is also the law of the place of the making of the contract—the record being silent on the point?

Kitzman v. Kitzman, 162 Wis., 253, was an action to avoid a marriage with an epileptic, the marriage having been celebrated in Minnesota, where it was voidable, and the parties having returned to their former residence in Wisconsin. The court say:

“The general proposition that a marriage, valid where the contract is made, is valid everywhere, carries with it as a necessary corollary the further proposition that such a marriage comes into a sister jurisdiction with all its inherent infirmities as well as strength. It can acquire no greater sanctity or impregnability by such removal than where solemnized. When properly challenged here, it can have acquired by reason of the parties returning to this state to live, no more immunity from attack than it would have had if they, from the time of the ceremony and thereafter, had lived in Minnesota and the action was there instituted. We shall give it no higher value than it had there”—

the Minnesota prohibition of marriage of epileptics not being contrary to any declared public policy of Wisconsin.

In *Thompson v. Thompson*, 202 S. W., 175, it is said that—

“The law of the state where a marriage was celebrated generally affords the criterion for testing its validity.”

Gorden v. Gordon, a case decided by the Supreme Court of Illinois within the present year—119 N. E., 313—is authority

for holding that proof that the relation between a man and woman, meretricious in its inception and prior to any claim of marriage, raises the presumption that it continues meretricious and casts upon the marriage claimant the burden of showing that the cohabitation has become lawful.

It is proper now to observe upon the state of the law of France upon the subject. We have already noticed the decree of the Council of Trent in 1563, changing the Canon law so as to require a ceremonial marriage or by license of the ordinary, and declaring void all marriages not so celebrated, and that England did not accept the change, but continued its recognition of the common law as then established on the subject. France, however, in common with the rest of Catholic Europe, acknowledged the binding force of the decree. That canon law obtained among the French to the time of the revolution succeeding 1789, and later was revived under the *modus vivendi* between Napoleon and the Pope in form of the concordat of that interregnum period. It was finally superseded, but not much changed by the Code Napoleon, which became the paramount law of France in the last year of the Consulate, 1804. The latter did not, as is commonly supposed, introduce much new law. It was a composite work, made up of a compromise between the theretofore customary law of the north of France, which was essentially German, and that of the eastern and southern provinces, which was mainly of Roman origin. It was impossible that it should lay the common-law of England under contribution at all; both because of its elementary habitat, just stated, and especially because Bonaparte manifestly would borrow nothing from a people which, as the severest expression of hatred, he stigmatized as "a nation of shopkeepers."

That code, Articles 144-226, lays down the conditions of marriage. It requires a publication of banns and a civil ceremony in the presence of witnesses. It still remains, in substance, the law of France, on the subject, and was so while the parties involved in this cause cohabited in that country. In international law it is settled that the *lex loci* governs. If the marriage is valid by the law of the country where it is celebrated, its validity is recognized everywhere. The converse is true; if

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invalid there, it is invalid everywhere. Commenting on this rule, in both aspects, Judge Story said it "has received the most deliberate sanction of the English and American courts and of foreign jurists." The important exceptions are incestuous and polygamous marriages.

Westlake—Private International Law, Chap. IV—says that an indispensable condition of a valid marriage is that the *lex loci* must be satisfied in respect of forms, consent of parents or guardians and capacity of the parties.

In regard to the claimed common law marriage in New Brunswick, our belief is that the claim is without importance. It rests upon alleged promises and announced expectations by Charrier while in that province, to go through the forms of a church marriage, depending on better times for himself financially—the Baron having by that time become really so, so far as paying anything more while his successor in madame's affections was enjoying what the late Samuel J. Tilden called the "usufruct." But the words were always in the future tense, while the cohabitation and the holdings out, relied on to establish the marriage, had already produced whatever consequences in the way of fixing the marriage status of the parties could flow from them; their daily repetition could add to that result no new force. At most, they could only ratify a contract already existent and pretty well executed, if it had ever become operative. We are not advised whether the common-law marriage was ever allowed in New Brunswick or not. If the question were material, the strong probability, historically, is that it never was recognized. Lord Hardwicke's act was in force in England before the conquest of Canada by that power, and what is now New Brunswick—then a part of Nova Scotia—inherited no more than that law permitted. If this were not so, still by the Quebec act of 1774, which covered the territory now New Brunswick, guaranteed to the inhabitants the administration of French law in all matters of civil controversy, reserving to the British crown only the right to apply its own jurisprudence on the criminal side. And this guaranty was peculiarly tender of ecclesiastical rights and laws. A like policy is believed to have there prevailed, in substance, operation and effect, down to the time of the British

North America Act of 1867, which is the present Constitution of the Dominion of Canada, including the maritime provinces.

But, as we have intimated already, in our view no marriage at common law can be predicated on this record, except such as is claimed to have been contracted and to have become effectual while the parties were yet in Paris.

We have then, this state of things: A relation in France which when first established offended the received notions of morality and so was meretricious. From this arises the presumption that the connection continued to be meretricious until proof is forthcoming that the cohabitation became lawful, the burden of repelling this presumption by proof removing it being cast upon the claimant of a legal relation. We have, further, the fact of history that the common law of England, or its equivalent in jurisprudential value, never was the law of France.

And we have the legal corollary that the relation of this man and this woman, established in Paris, in Ohio stands loaded with whatever legal shortcomings and infirmities existed by virtue of the laws of France at the time it was entered into. If that relation continued to be meretricious up to the time when it was ended, and was not at any time a lawful cohabitation, then a lawful marriage of one of the parties to a third party, with its physical consummation, could not be the source of the adulterous intercourse denounced by the statute under which the accused is here prosecuted.

If this were the last word upon the subject, if no more were to be said, then indeed the conclusion of the insufficiency in law of the judgment under review would follow, surely.

But there is a difficulty lurking in the situation. All that we have stated in regard to the laws and their history discussed, rests in assumption. The record before us is silent in regard to them all. They are indeed universally well known, but proof of none of them was offered at the trial below.

The inquiry at once arises, was such proof necessary on the part of the accused to work exoneration for him from the charges of the information? So far as the law of common-law marriages is concerned, no such proof was necessary, as tending to support the conviction here challenged. As a part of our inherited law,

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allowed and recognized by the courts of Ohio, judicial notice is taken of it, without more.

The difficulty resides in the question whether the negation of the common law as we have it, or its non-existence, in France, with the historical basis of its absence from that country, without testimony *pro forma* produced, can be used to overcome the legal inference that a marriage valid where it was contracted, is valid everywhere, or in aid of the legal presumption that a connection meretricious in origin continues to be so until a lawful relation is shown to have succeeded to it. May we take notice, judicially, of what we know and what the world long has known, at a time when all the witnesses to the matter of fact noticed have long been dead, and who, were they living and in court, could tell us nothing which we did not already know as well as they could know it?

The following propositions are stated in Ruling Case Law, Vol. 15, p. 1038 *et seq.*, and rest upon undisputed authority:

"The general rule is that matters of history, if sufficiently notorious to be subject to general knowledge, will be judicially noticed. The reason for this recognition has been said to be that the facts of history enter into the construction of the laws, and so must be in the knowledge of the court whose duty it is to construe them. * * * But the knowledge of the courts in this country is not limited to events in the history of the United States, or of the several states, but extends also to other historical events which because of their connection with the history of this country, or because of their general notoriety, may be assumed to be matters of general knowledge."

As to the last proposition, see *Neely v. Henkel*, 180 U. S., 109.

In *Banco De Sonora v. The Bankers Mut. Casualty Co. et al.* 119 Iowa, 450, it is said:

"As to whether the civil law is the foundation of Mexican jurisprudence, the histories are quite as accessible to the court as to the witnesses. Probably judicial notice should be taken of the fact as a matter of history. * * *

"We know that Mexico was a Spanish province for about three hundred years, and then became, and still is, a republic. At no period of its history has it been under British sovereignty. Its institutions are Latin and not Anglo Saxon, and the common law is not presumed to be in force in any state or country where English institutions have not been established."

See, also *Savage v. O'Neil*, 44 N. Y., 298; *Norris v. Harris*, 15 Cal., 252; *Flato v. Mulhall*, 72 Mo., 522; *Brown v. Wright*, 58 Ark., 20; *Davis v. Gibson*, 56 Fed., 443.

Wigmore, Evi., Section 1597, says:

"The principle of necessity, allowing this class of evidence, is the same as that already examined (1582), namely, the matter as to which the history or other treatise is offered must be an ancient one, or one as to which it would be unlikely that a living witness could be obtained."

The headline of the next section of the same work is:

"Matter must be of General Interest."

In *Morris v. Lessees*, 7 Pet., 583, Judge Story observes:

"Historical facts of general and public interest may indeed be proved by reputation, and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined * * * to cases where from the nature of the transaction, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for the reception of general confidence."

In *Bogardus v. Trinity Church*, 4 Sandf. Ch., 724, it is said:

"The statements of historians of established merit * * * are from necessity received as evidence of facts to which they relate, * * * restricted to facts of a public and general nature."

In *McKinnon v. Bliss*, 21 N. Y., 216, Selden, J., observes:

"Such evidence is only admissible to prove facts of a general and public nature, and not those which concern individuals and mere local communities. * * * History is admissible only to prove history; that is, such facts as being of interest to a state or nation."

Lord Campbell in the *Sussex Peerage Case*, 11 C. L., and F., 113, said:

"You ask the witness what the law is. He may from his recollection, or on producing or referring to books, say what it is, or that it is correctly stated in such a book."

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In *Pickton's Trial*, 30 Howell, St. Tr., 492, Lord Ellenborough's language was:

"The text-writers furnish us with their statements of (foreign) law, and that would be good evidence upon the same principle which renders histories admissible. * * * I shall, therefore, receive any book that purports to be a history of the common law of Spain."

I am now to observe upon what may seem, from these authorities, to be an inferable necessity to have this historical knowledge brought physically before the court in the shape of the book itself or some expert who derives his expertness from having read the book, instead of letting the judge or judges spin the same knowledge out of their own inner-consciousness, where it is known to exist in full vigor and accuracy. For my own part, I must say that I do not, as I conceive, need to be bound in calf or the covers of buckram, in order to tell myself what is contained within books so bound or imparted to me by other calves, who at most can be only messenger-boys, bringing me information which I long before had. A court, I suppose, may take judicial notice of what itself knows, if of the character and quality to make it competent evidence, no matter how conveyed to him or brought to his attention. In the trial of *Spencer Cowper*, 13 Howell, St. Tr., 1163, the following dialogue was had—Dr. Crell being on the stand:

"Now, my lord, I will give you the opinion of several ancient authors.

"Baron Hatzell: Pray, doctor, tell us your own observations.

"Dr. Crell: My lord, it must be reading, as well as a man's own experience, that will make any one a physician; for without the reading of books of that art, the art itself can not be attained to; besides, my lord, I humbly conceive, that in such a difficult case as this, we ought to have a great deference for the reports and opinions of learned men. Neither do I see any reason why I should not quote the fathers of my profession in this case, as well as you gentlemen of the long robe quote Coke upon Littleton and others. But I shall not trouble the court long: I shall only ins't on what Ambrose Parey relates in his chapter of Renunciations."

Wigmore—Section 1697—punctures the fallacy of the distinction, thus:

“But the fiction may well be abandoned. The daily use by judges of foreign law books in our libraries, exposes its untruth. Goldsmith's Chinese Traveler would smile to see the judge refuse to listen to a foreign treatise while on the bench, and then retire to his chambers and take down the same book from the shelves to refresh his judicial memory.”

In closing our perhaps over-long discussion of the law appertaining to this case, we desire to acknowledge our indebtedness to counsel for the able brief which has materially aided our research.

We feel that there are no moral considerations in favor of the accusing witness, or sympathy to be mawkishly bestowed in the case. She ought to accept the consequences of vagrant amours, nor ask the state to aid in her revenge, however natural to her the pursuit of it may be.

“Heaven has no rage like love to hatred turned,
Nor hell a fury like a woman scorned.”

She did not pursue the baron—except for purposes of revenue, notwithstanding that she was impartial in her sufferings for the two—having borne a child to each of them. It is a plain case of “fifty-fifty.” She seems to have applied the wholesome maxim—“Equality is equity.” What the state is seeking by this prosecution, is not the redress of injured innocence, but the vindication of a really adulterous course of living by punishing one which in the eye of the law is not so.

Our conclusion is that, within judicial knowledge, as a fact of history, the relations and conduct of the parties in France relied on by the state to establish a marriage at common law, were insufficient to operate that effect, in contemplation of the law of that country, by which the validity of the claimed marriage is alone to be measured and tested. To the benefit of this conclusion the accused was, and is entitled.

Some errors are alleged in respect of admission of testimony. We have examined the questions. Probably they were competent as tending to show “state of mind,” which seems to be the drag-net to sweep in much matter that otherwise would

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clearly be inadmissible. Even if they were not proper, we can not say that they were prejudicial to any substantial right of the accused.

His conviction is not supported by sufficient evidence and the judgment complained of is contrary to law.

It follows that the judgment of the court of common pleas, affirming that of the probate court, should have been one of reversal instead of affirmance, and should itself be reversed for that reason, which is accordingly done.

It follows, further, that—the facts being undisputed and the law being with the accused—this court should proceed to render the judgment in the case which the probate court should have rendered but did not, namely—a judgment of acquittal, which it now does accordingly.

DUNLAP, J., and LAWRENCE, J., concur.

KEEPING BUTCHER SHOPS OPEN ON SUNDAY.

Court of Appeals for Hamilton County.

CHARLES DERRICK v. STATE OF OHIO.*

Decided, March 27, 1918.

Criminal Law—Prosecution for Keeping Open on Sunday—Supplying Meat to the Tenement Class on the First Day of the Week Not a Work of Necessity, When.

The keeping open of a place for the sale of meat on Sunday, in a thickly populated district where the people are of the tenement class and not financially able to provide themselves with ice boxes or other means for preserving meats, where such opening occurs during that part of the year when the weather is sufficiently cold to preserve meat and other vegetables, is not a work of necessity and, therefore, does not fall within the exception provided in Section 12045.

*In the subsequent case of *State v. Best* the court held that keeping open for the sale of meat on Sunday in March was not a work of necessity for the same reason given in the above opinion. Motions to require the Court of Appeals to certify its records in both of these cases were overruled by the Supreme Court July 16, 1918.

Müller & Foster, for plaintiff in error.

H. J. Siebenthaler and *E. S. Morrissey*, Assistant Prosecutors, contra.

BY THE COURT.

The case here presented involves a charge of the violation of Section 13044, General Code, providing against the keeping open of a place for the transaction of business, upon the first day of the week commonly called Sunday.

The specific charge is that the defendant unlawfully and knowingly caused to be open for the transaction of business, to-wit, the sale of meats, a certain place in the city of Cincinnati, Hamilton county, Ohio.

Defendant was tried and convicted in the municipal court of Cincinnati, without the intervention of a jury.

The defendant contends that the keeping open of the place for the sale of meats was a work of necessity, and came within the exception provided in Section 13045, General Code; and that it was made such a work of necessity by the fact that the place was located in a thickly populated tenement district of the city where the inhabitants were not able financially to maintain ice-boxes or other methods of preserving meats.

The evidence discloses that the transaction took place in January, and the court is of the opinion that at that season of the year it can not be considered such a work of necessity, as the nature of the weather is such that it is not a difficult matter to preserve meats—the court taking judicial notice of the fact that at that time of the year the weather is sufficiently cold to preserve meat and other food stuffs. We therefore hold that under the evidence this was not such a work of necessity as would avoid liability under the statute.

Finding no error in the record, the judgment will be affirmed.

JONES, P. J., GERMAN, J., and HAMILTON, J., all concur.

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**STATUS AS HEIR OF ONE WHOSE LEGITIMACY HAS
BEEN ACKNOWLEDGED.**

Court of Appeals for Belmont County.

**CARL S. LAROCHE v. WILLIAM F. LAROCHE; and
CARL S. LAROCHE v. LOUIS F. LAROCHE ET AL.***

Decided, December 5, 1917.

*Wills—Life Estate—Vested Remainder—When Divested by Death—
Deed or Will Conveys No Interest, When—Acknowledgment of
Legitimacy Under Favor of Section 8591, General Code, What Is—
Status of Heir, Sufficiency of Proof—Birth within Lawful Wedlock
Raises Presumption of Heirship, When—Right to Take Under Pro-
visions of Will Arises, When.*

1. Where by will a testator devises all of his real estate to his wife for the remainder of her natural life, or so long as she remains unmarried, and provides that in the event of her remarriage that she should have such portion of the estate as the law fixes for a surviving widow, and that the remainder be equally divided among his four children named in said will, and further that if any of them be deceased at the time of such remarriage, leaving no issue, that such share or shares be equally divided among his other children, and further that at the death of his said wife, should she remain unmarried until that time, all of his estate real and personal should be then equally divided among his sons aforesaid" and in the event that any were deceased at the death of his said wife, then the share of such deceased son should go to his children and if no children living, then such share should be equally divided among his remaining children, or their heirs—such will vested in each child his proportionate share to said estate at the death of the testator, subject to being divested by the death of such child before the death of the widow, and a deed or will made by such child for his share in said estate and prior to the death of the widow will not convey any title or interest in and to such share.
2. Where a man marries a pregnant woman who has preferred a bastardy charge against him, and later a child is born in lawful wedlock and the putative father visits the mother and child soon after

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, October 22, 1918.

birth and afterwards makes a bequest to said child in his last will and testament, such recognition is a sufficient acknowledgment under favor of Section 8591, General Code, to render such son legitimate.

3. To establish status as heir or heirship of one begotten out of but born in lawful wedlock, it is not required that the proof be clear and convincing; such claim need be shown affirmatively only; that is, by a preponderance of the evidence, the burden being upon the one asserting such claim.
4. Where a man marries a woman having a son born out of lawful wedlock and such son is taken into their home and treated as one of the family, is given and known by the family name, is referred to in the last will and testament of the husband as one of his children, and as his son, and such will further provides that if, at the death of his surviving widow, who is bequeathed a life estate in his realty, any of his sons shall be deceased the children of such son are to have his share, such recognition and testamentary provision are sufficient to entitle the son of such person born out of lawful wedlock, his father being dead, to take directly under the provisions of said will.
5. Proof of birth within lawful wedlock raises the presumption of the right to inherit through the father.

*C. C. Sedgwick and Heinlein, Spriggs & James, for plaintiff.
Kennon & Kennon, contra.*

FARR, J.

Heard on appeal.

The cases of Carl S. LaRoche against William F. LaRoche, and Carl S. LaRoche against Louis F. LaRoche et al, were actions in partition filed concurrently on the 26th day of September, A. D. 1916, in the court of common pleas of this county. In the first case the plaintiff seeks the partition of lots numbered 19 and 73 in Harris' addition to the city of Bellaire. In the second action partition is sought of certain real estate of which John LaRoche, Jr., died seized. To each petition an answer was filed denying that the plaintiff had any right, title or interest in and to the premises sought to be partitioned and that title vested in defendants, and in the first case it is sought by cross-petition to quiet the title to the premises described in the petition.

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Partition was ordered in the court below, from which order and judgment an appeal was taken to this court. Said causes were heard together here and will be decided in like manner.

In the first case the plaintiff, Carl S. LaRoche, claims an undivided one-third interest in and to said lots above mentioned which the defendant denies and alleges that he is the sole owner of said premises in fee simple. The plaintiff claims title by certain provisions of the last will and testament of John LaRoche, Sr. The defendant claims title by provisions of said will and the last will and testament of Fred LaRoche, deceased, and by reason of a certain deed made and delivered by said Fred LaRoche to him on or about the 8th day of October, A. D. 1888.

John LaRoche, Sr., died testate June 9, A. D. 1884, and his last will and testament was duly admitted to probate in this county June 30, A. D. 1884. Fred LaRoche died testate on or about October 21, A. D. 1888. John LaRoche, Jr., died intestate and without issue in A. D. 1890. Charlotte Schumacher LaRoche, widow of John LaRoche, Sr., died June 21, A. D. 1908. John LaRoche, Sr., and Charlotte Schumacher were married in Germany in A. D. 1852. At the time of said marriage Charlotte Schumacher had a son, Fred, about two years of age, born out of wedlock who, ever after said marriage, made his home in the home of John LaRoche, Sr., until at the time of his (Fred's) death, on said 8th day of October, A. D. 1888. A few days prior to his death, Fred LaRoche, so known in the community, made a last will and testament and a deed of conveyance devising and conveying all of his estate to said John LaRoche, Jr., including any interest he might have in and to the estate of John LaRoche, Sr. Fred LaRoche, in A. D. 1879 was charged by one Samantha Roofer with being the father of her unborn child; their marriage followed at St. Clairsville on March 18th of that year, and on May 16th following, about two months later, this plaintiff Carl S. LaRoche, was born, and he bases his right to partition herein upon the claim that he is the son of Fred LaRoche, deceased, but claims not herein from Fred LaRoche, but directly from said John LaRoche, Sr., and under favor of the third fourth and fifth

items of the said last will and testament of John LaRoche, Sr., deceased, which read as follows:

"Item 3. I give and devise to my said wife all my real estate during her natural life or so long as she remains unmarried, she to have all the rents and profits, keep the same in repair and pay all taxes.

"Item 4. In case my said wife shall marry again she shall then only have such share or portion of my estate as the law allows and the remainder shall be equally divided among my four children, Fred., Louis, John and William LaRoche, and in case either or any of them should be deceased at such time leaving no children, the share of such one shall be equally divided among my other children.

"Item 5. At the death of my said wife, should she remain unmarried until that time, it is my will that all my estate real and personal, be then equally divided among my four sons aforesaid, and in case any shall be deceased at that time his children are to have his share, and if he has no children living the same shall be equally divided among the remaining ones or their heirs."

The determination of the issue here involves the construction of the foregoing items, and is simply this: did the interest or share of Fred LaRoche under said will vest in him absolutely during his life time so that he might devise it by will or convey it by deed? If so Carl S. LaRoche has no interest and is not entitled to partition herein because Fred LaRoche, whom he claims was his father, sought to devise by will and convey by deed to defendant herein the property sought to be partitioned. If on the other hand said interest did not vest or vested subject to being divested upon the death of Fred LaRoche before the death of his mother, Charlotte LaRoche, then Fred LaRoche had no interest to convey to John LaRoche, Jr., which he attempted to do by will and deed, as above stated.

In order that subsequent discussion may be better understood, the relation of the parties will be here considered.

It is urged in argument that Fred LaRoche, so called, was not the son of John LaRoche, Sr., and therefore, Carl S. LaRoche, even though he be the son of Fred LaRoche, could not take directly from John LaRoche, Sr. It must be noted that said

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testator in Item Four provides as follows, "The remainder shall be equally divided among my four children: Fred, Louis, John and William LaRoche," and again in Item Fifth the testator provides among other things that "all my estate real and personal be then equally divided among my sons aforesaid."

It will be observed that in the foregoing said testator designates Fred as one of his "children," also as his "son." And having so provided, it must be so considered no matter whose son he was; though he be the son of a neighbor the testator might elect to include him in his will with his children born in lawful wedlock; and he further provided, that if Fred be deceased, at the date of the death of his testator's wife that his, Fred's, children, should have his share. In any event Carl LaRoche must take under said will if he is Fred LaRoche's son, which will be discussed later.

However, the record discloses that the boy Fred was taken into the home of John LaRoche, Sr., upon his intermarriage with the mother, and there reared and treated as one of the children until the time of his (Fred's) death, when his body was laid in the family lot in Rose Hill Cemetery, and his name inscribed on the "LaRoche" family monument, and so paternal was the conduct of John LaRoche, Sr., toward Fred, that Louis LaRoche says that until he (Louis) reached the age of 15 years he considered Fred his older brother and John LaRoche, Sr., by and in that solemn instrument, his last will and testament, designates Fred as one of his "children" and as one of his "sons aforesaid." Maybe the testator and his wife brought a secret from Germany, which they prudently and properly enough saw fit not to impart to others; but be that as it may, it is to the credit of John LaRoche, Sr., that whether or not he was the natural father of Fred, he did his full duty by him and fittingly and fully acknowledged him as one of the rightful objects of his bounty, and so far as the provisions of this will are concerned he may be treated as a son.

Objection is made to the testimony of William and Louis F. LaRoche in this and the court below, which it is claimed is ad-

missible under the last clause of Section 11945, G. C. Without taking time to discuss the issue fully, suffice it to say that said testimony is found to be incompetent in view of the provisions of said section, and therefore, it must be eliminated from the consideration of this case.

However, to maintain his right to partition herein, Carl S. LaRoche must be found to be the son of Fred LaRoche, deceased. Under pressure of circumstances, Fred LaRoche married Samantha Roofer in A. D. 1879. A little less than two months later, Carl was born in lawful wedlock, and although Fred LaRoche never lived with his wife or family, yet having been born in lawful wedlock a strong presumption obtains in favor of his legitimacy, and it is so observed in *Powell v. State*, 84 O. S., 164, by Donahue, J., at page 168 as follows:

“ * * * a strong presumption always obtains that a child either born in lawful wedlock, or within the competent time after its termination is legitimate.”

And in *Müller v. Anderson*, 43 O. S., 474, in the 2nd paragraph of the syllabus it was held:

“2. By such marriage the man so marrying consents to stand in *loco parentis* to such child and is presumed in law to be the father of the child, and this presumption is conclusive.”

The foregoing is sustained by *Tiogo Co. v. South Creek Tp.*, 75 Pa. St., 453; *State v. Romaine*, 58 Iowa, 46, 48; *State v. Hermann*, 35 N. C. (3 Ired.), 502; *Parker v. Way*, 15 N. H., 45; *Page v. Dennison*, 29 Pa. St., 420; Wigmore on Evidence, 134.

In addition to this presumption, a lady by the name of Mrs. Kate Naylor testified upon the trial below that within about one hour after the birth of Carl, Fred LaRoche was at the bedside of his wife. His presence there would seem to indicate a friendly interest at least in both mother and child. The record does not clearly disclose that he ever disowned the boy, but on the contrary, provided in his last will and testament a legacy of five dollars; though he tried to alien from the child all of the remainder of his estate by said will and deed.

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Section 8591, G. C., provides in part as follows:

“When, by a woman a man has one or more children, and afterwards intermarries with her, such issue, if acknowledged by him as his child or children, will be legitimate.”

The record, therefore, fairly discloses that Fred LaRoche recognized Carl as his son, and by the required quantum of proof that Carl S. LaRoche is the son of Fred LaRoche, deceased.

Coming now to construe said will, it is fundamental that the controlling principle in its construction is to ascertain from the whole will the intention of the testator as therein expressed. *Linton v. Laycock*, 33 O. S., 128; *Barr v. Denny et al*, 79 O. S., 358.

However, no specific rule or rules can be declared for the construction of wills, because each must be construed largely in the light of its own provisions.

Governed by these principles, it is clear that the testator desired his wife to have a life estate in his estate during her natural life, or so long as she remained unmarried.

In the event that she remarried she should have the portion of his estate provided by law, and the remainder be equally divided among his four children, including Fred, and in case any of them should be deceased at such time, without issue, such share should be equally divided among the surviving children. In the event that said widow should die, without remarriage, then the estate should be divided equally among his “sons aforesaid,” and in case any were deceased, at the time of the wife’s decease, and such deceased son left children, then such children should have the deceased parent’s share, and if no children survived then such share should be equally divided among the remaining children or their heirs. Clearly it was the desire of the testator that his “next of kin” should, in any event, be the beneficiaries of his estate; but can it be so held under the provisions of said will?

That depends, as above stated, whether said interest vested absolutely in Fred LaRoche at the death of testator, or whether it vested subject to being divested by the death of Fred

before his mother. The mother did not remarry and Fred preceded her in death by about ten years. He left his son Carl; therefore, it is clear that it was the intention of testator as expressed in item five that the son Fred being deceased at the time of his mother's death, that the son Carl should have his father's share; that is to say, that the grandson should have the son's share, and which one would receive that share could only be determined by the situation at the time of the widow's death.

The issue must be determined, therefore, by determining whether the estate vested absolutely in Fred LaRoche, or whether it vested subject to being divested by his death before that of his mother. The distinction between a vested and contingent interest is clearly made in *Richey v. Johnson*, 30 O. S., 294, and need not be here discussed. While it is true that under the common law, it was impossible to limit any estate after a fee, yet by the enactment of the "statute of wills" the doctrine of executory devises has been adopted, and it is now the law that there may be created by a will a vested estate in fee simple, liable to be divested in favor of another estate. The controlling authority in this jurisdiction is *Collins v. Collins*, 40 O. S., 353. In this case the testator devised his real and personal estate to his wife during her natural life with the remainder over to his two sons and their heirs. In the event of the death of either without issue, the estate should go to the survivor. It was held in the first paragraph of the syllabus as follows:

"1. That by the will of their father each took a vested remainder in fee-simple in one undivided half of the lands, defeasible upon the contingency of the death of either, leaving no children at his decease, and leaving the other brother to survive him."

The foregoing is supported in principle by: *Jeffers v. Lampson*, 10 O. S., 101; 24 Am. & Eng. Ency. of L., 2nd Ed., 431; 2nd Cooley's Blackstone, 172; Tiffany on Real Property, Section 134; Tiedman on Real Prop., Section 530.

It is urged that the law favors the vesting of estates in Ohio, and so it is held in *Linton v. Laycock*, 33 O. S., 128, as follows:

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"3. The law favors the vesting of estates, and in the construction of devises of real estate, the estate will be held to be vested in the devise at the death of the testator, unless a condition precedent to such vesting is so clearly expressed that the estate can not be regarded as so vested, without directly opposing the terms of the will. To this end, words of seeming condition will, if they can bear that construction, be held to have the effect of postponing the right of possession only, and not the present right to the estate."

The foregoing is supported by the strong weight of authority in this and numerous other jurisdictions, notable among which are the following cases: *McArthur v. Scott*, 113 U. S., 380; 28 L. Ed., 1027; 5 Sup. Ct. Rep., 652; *Own v. Eaton*, 56 Mo. App., 569; *Wooley v. Paxen*, 46 O. S., 318; 21 B., 307; *Bolton v. Bank*, 50 O. S., 293; 29 B., 330; *Johnson v. Johnson*, 51 O. S., 540; *Canfield v. Kallon*, 26 Miss., 352; 57 N. Y. Supp., 149.

A case well in point is *McCarthy v. Hansel et al*, 4 App., 425; 25 C.C.(N.S.), 283. The first paragraph of the syllabus reads as follows:

"1. The will of a testator contained a provision devising his estate to his widow for life and the following: 'After the death of my wife, I give, devise and bequeath unto my children all of my estate, real or personal, of whatsoever kind and wheresoever situated, share and share alike; if any of my children should die previous to that time, leaving heirs of their body, then and in that case such heirs to take the share or shares, which would have been due to their parent or parents, if living.' That the estate devised to each child was a vested remainder, subject to be divested by his death during the continuance of the life estate, and a deed made by such child during such time conveyed no interest in the property."

The foregoing can scarcely be differentiated in any way or manner from the instant case, and especially as to the facts which need not be discussed here.

In full accord with the above case and the case at bar is that of *Camp v. Cronkright et al*, 13 N. Y. Supp., 307, the syllabus of which reads as follows:

"A testator devised to his wife certain property during 'her natural life, and upon her death then I give and devise the same

to my children share and share alike absolutely and forever, the child or children of any deceased child of mine to take the share which his, her or their parent would have taken if living.' After testator's death, but during the life time of his widow, C., one of his five children, conveyed an undivided fifth interest in the premises, and his grantee conveyed the same to defendant. Thereafter, and during the life time of testator's widow, C. died leaving three children, surviving him. That the will vested an undivided fifth interest in remainder in the premises in C., subject, however, to be divested by his death in the life time of his mother; that defendant's title therein was subject to be divested by the same contingencies; and that upon the death of C. said fifth interest became vested in his surviving children."

It is urged, however, that *Anderson v. Realty Co.*, 79 O. S., 24, is at variance with the foregoing. The second paragraph of the syllabus reads as follows:

"2. Where, in a will, there is a devise to a son, and if he dies without lineal descendants, living at the time of his decease, then over, these words are not, by themselves, without assistance from other parts of the will, sufficient to create an estate by implication in the lineal descendants, but the son takes a fee defeasible upon his death without lineal descendants, living at the time of his decease, and in the event of lineal descendants living at the time of the son's decease his fee becomes absolute and such descendants have no interest under the will as against his grantee."

It will be observed that the principle issue under discussion in *Anderson v. Realty Co.* is estates by "implication" which is not involved here. In the above case the son took a fee defeasible upon his death without lineal descendants, which indicates a similar view to that held in the above case of *McCarty v. Hansel*, 4 App., 425, 25 C.C.(N.S.), 283, and so it is further disclosed by the discussion of the cause by Summers, J., at page 50. It follows, therefore, that said case is not particularly helpful in determining the issue here, which however is practically determined by the cases above mentioned, and it must be held that the share or interest of Fred LaRoche vested in him at the death of testator John LaRoche, Sr., subject to

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being divested by the death of Fred before his mother, which so happened; therefore, Carl S. LaRoche, plaintiff, being the son of Fred LaRoche and who survived him, also the widow, Charlotte LaRoche, the plaintiff takes his father's share but directly under the will of John LaRoche, Sr. Therefore, the will and deed made by Fred LaRoche to defendant William F. LaRoche were ineffective to convey title to his interest in the estate of John LaRoche, Sr.

An order of partition will be granted and the same commissioners named as appointed by the court below unless some change is desired.

The answer and cross-petition filed by defendant William F. LaRoche in the court below asked the reformation of said deed because it recites incorrect lot numbers. In view of the finding herein, reformation will not be necessary so far as the property here involved is concerned; yet if it be considered advisable or desirable to direct such reformation in order to remove any possible inference or suspicion of cloud from the property of such person or persons as may hold title to the lots numbered in said deed, a proper decree may be entered for that purpose.

In the next case partition is sought by plaintiff of an estate by purchase owned by John LaRoche, Jr., at the time of his decease intestate and without issue, in A. D. 1890. The plaintiff's right to partition in this case is based upon his claim that Fred LaRoche was the brother of John LaRoche, Jr., and that he, plaintiff, is the son of said Fred LaRoche.

It is urged that since the legitimacy of the said Carl S. LaRoche is raised here, that proof of his right to inherit through his alleged father Fred LaRoche must be clear and convincing because it is claimed that the rule as to the presumption of legitimacy arising from the marriage of Fred LaRoche and Samantha Roofers prior to the birth of the boy, while applicable under the bastardy statute, is not applicable to actions where questions of heirship and inheritance are involved, and so it is held in *Miller v. Anderson*, 43 O. S., 171, third paragraph of the syllabus; which case can be easily distinguished, however, from the case at bar since the facts are quite different. In the above

case Emiline Miller was married to one Riddlemoser while *enciente*, said marriage occurring about six months after pregnancy, and of which Riddlemoser was fully aware but married her with a full knowledge of her condition. The child was born in their home and was cared for by them jointly during some two and a half years until Riddlemoser's death. Another child was born to them and about sixteen years after the birth of the first child and some thirteen years after Riddlemoser's death, Emiline Miller filed a complaint in bastardy against one James M. Anderson charging him with the paternity of the first child. The court held, and quite properly, that all the facts being known to Riddlemoser at the time of marriage that he had consented to stand in *loco parentis* to said child which, having been born in lawful wedlock, was conclusively presumed to be legitimate, but as above stated, this presumption was held to have no application to actions where questions of heirship and inheritance are involved and the reason is obvious; another child had been born whose rights as an heir-at-law could not be aliened by the father's election to stand in *loco parentis* to the unborn child of the woman whom he married and whose condition he well knew at the time. It is somewhat interesting to contemplate the paragraph of the syllabus under discussion here in view of the fact that but a single statement is made in relation thereto in the opinion by Atherton, J., at page 480, as follows:

"As recognized in that case, we do not affirm this rule holds good on questions of heirship. There the rights of others are involved outside of the husband and the alleged bastard child."

In the foregoing discussion reference is made to the case of *State v. Shoemaker*, 62 Iowa, 343, which is quite similar to said case of *Miller v. Anderson* and in the latter case Judge Atherton observes at page 479 as follows:

"He chose to marry her and thus legitimate her issue and make it his own; the act would have made the child heir to his estate, and, being made so by his act, can the inhuman mother, by her uncorroborated testimony, make it a bastard?"

And again as follows:

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"Can they be bastardized by proving somebody else begat them, and especially can their mother bastardize them and take from them the rights they acquired by the marriage of their mother with the man that acknowledged them to be his own?"

It is true that the syllabus is the law of the case but it is very difficult here to harmonize the dictum with the third paragraph of the syllabus. However, it must be noted that said paragraph does not sustain the contention here, that where the claim of heirship is made in such case that the proof must be clear and convincing; far from it; it merely holds that a presumption of legitimacy arising from birth within lawful wedlock has no relation to actions where questions of heirship and inheritance are involved; that is, such presumption could not obtain in such cases conclusively against facts to the contrary. However, the modern tendency of courts is to relax this rule somewhat, as stated in *Wilson v. Wilson et al*, 39 C. D., 393 (28 O. C. A., 309), a well considered case, the first paragraph of the syllabus of which reads as follows:

"1. A decree of divorce between parents of an unborn child does not affect the legitimacy of the child, even though such legitimacy was effected by the parents marrying after this child was conceived. Such child, therefore, is an heir at law of the father and as such has an interest to contest his will."

Kunkle, J., in discussing the above case of *Miller v. Anderson*, observes at page 396 as follows:

"We think this discussion applies to heirship and the right of inheritance, although the issue in that case was limited to proceedings under the bastardy statutes."

The most, therefore, that can be said for the above case of *Miller v. Anderson* is that it holds in effect that in such cases, proof of heirship or the right to inherit must be proven as any other fact; that is, affirmatively or by a preponderance of the evidence, the burden being upon one asserting such claim, and so it is held in *Hall v. Wilson*, 14 Ala., 295, *Payne v. Payne*, 29 Vt., 172, 70 Am. Dec., 40, 4 Ency. of E., 576. In the case at

bar, Fred LaRoche charged with the paternity of the son Carl, married the mother, Samantha Roofer, who declared in court upon the trial of this cause that Fred LaRoche was the father of Carl; about two months after the marriage the child was born; within about one hour Fred LaRoche was at the bedside, so Mrs. Naylor states, and it is not denied; a strange and most unusual place for an innocent man, especially if compelled to marry the woman against his will and convinced of his own innocence. Careful examination of the record fails to disclose that he ever expressly denied the paternity of the child, while in some ways, at least, his conduct betokens the fact that he recognized his share of the responsibility for this boy. True, he tried to alien the greater part of his property by deed and will to his brother William, all but a bequest of \$5 to Carl, and thereby deprive this boy of any interest in his estate; however this is not conclusive of a refusal to acknowledge him as a son because it is by no means unusual for a parent for some real or fancied grievance to disinherit or deprive a natural child of acknowledged legitimacy, of any share or portion in such parent's estate. Therefore, adopting here the discussion of these matters in the first case, so far as it may be of value, it follows that it must be held that Fred LaRoche was the brother of John LaRoche, Jr., and that the record shows affirmatively and by a fair preponderance of the evidence, as above stated, that Carl S. LaRoche is the son of Fred LaRoche, deceased, and is therefore entitled to partition in this cause, and the same order will be made as to the appointment of commissioners as made in the court below. An accounting as to rents and profits was made in the court below, and that issue is certified back for determination in said court. Partition ordered in both cases.

POLLOCK, J., and METCALFE, J., concur.

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Cuyahoga County.

APPEALS FROM JUSTICES OF THE PEACE.

Court of Appeals for Cuyahoga County.

WILLIAM ENGER V. GEORGE KING.

Decided, June 10, 1918.

*Bond—On Appeal from a Justice of the Peace—Executed Within Time,
When—Sections 10216 and 1038.*

The provisions of Section 10216, fixing the manner of computing the time within which an act is required by law to be done, applies to practice in courts of justices of the peace, and an appeal bond perfected before a justice of the peace in accordance therewith is not open to attack on the ground that it was not perfected within the time required by law.

A. L. Steuer, for plaintiff in error.

A. J. Armbruster, contra.

LAWRENCE, J.

This is a proceeding in error to reverse a judgment rendered by the court of common pleas in an action brought there on appeal from the court of a justice of the peace. Enger, plaintiff in error, was defendant in both the lower courts.

In the court of common pleas a motion was made to dismiss the appeal for the reason that the appeal bond was not signed within the time required by law; this motion was sustained, and error is now prosecuted in this court to reverse the judgment of the court of common pleas thereon.

From the transcript of the justice of the peace it appears that the judgment was rendered September 6, 1917, and the appeal bond was given and approved September 17, 1917, and the sole question now presented for our consideration and determination is, was the appeal perfected within the time required by law.

The court takes judicial notice that the 16th day of September, 1917, fell on a Sunday. Section 10383 of the General Code provides:

"Within ten days from the time a justice renders judgment, the party appealing therefrom must give a bond to the adverse party, though he need not sign it, with at least one sufficient surety to be approved by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of the judgment and costs." * * *

The General Code has been the law in Ohio since its approval by the Governor in 1910.

Section 10216 of the General Code provides:

"Unless otherwise specifically provided, the time within which an act is required by law to be done shall be computed by excluding the first day and including the last; except that the last shall be excluded if it be Sunday."

One object of the Legislature in creating the codifying commission, if not its chief purpose, was to do away with different statutes relating to the same condition.

Before the General Code became effective, Section 4951 of the Revised Statutes, now Section 10216 of the General Code, did not apply to practice in the justices' courts.

Part Third of the General Code covers the Remedial Legislation of the state, and is divided into nine subdivisions or titles: Title I, "Preliminary," contains general provisions applicable to all the courts, and included therein is Section 10216 quoted above; Title II, "Procedure in Justices' Court;" Title III, "Procedure in Probate Court," followed by titles, applicable to common pleas and court of appeals respectively, which clearly demonstrates to our minds that Section 10216 must be construed as extending to acts in all the courts. We can see no reason why it should not so apply, and we hold that it does and a bond given in accordance therewith is sufficient.

This being true, the judgment of the court of common pleas is reversed, and the case remanded to that court for further proceedings.

GRANT, J., and DUNLAP, J., concur.

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**CONTRACT RENDERED VOID THROUGH FAILURE TO
ADVERTISE.**

Court of Appeals for Cuyahoga County.

THE CITY OF EAST CLEVELAND V. THE FRISBIE COMPANY.*

Decided, July 1, 1917.

Water Works—Strict Compliance with Statutory Provisions Required in Construction of—Competitive Bidding Not Avoided by Fact that Streets Upon Which Pipes Are to be Laid Have Not Been Dedicated—Contract to Lay Pipes Rendered Invalid by Failure to Advertise for Bids—Liability Not Created by Usage or Custom—Use of Pipes Does Not Constitute Conversion.

An action does not lie against a municipality on a contract entered into by water works trustees for the laying of pipe in streets not yet dedicated, payment therefor not to be made until such time as the earnings from said pipes reach ten per cent. per annum of the cost of installation, where bids for said work were not solicited by advertisement in accordance with the statutory requirement.

E. A. Binyon, for plaintiff in error.

Clum & Marty, contra.

LIEGHLEY, J.

The parties were in reverse order in the court below, and for convenience will be so mentioned herein.

The plaintiff, the Frisbie Company, filed its petition in the court of common pleas, declaring in three causes of action that in three different allotments it installed water pipes under contract with the defendant to repay when the water rentals on each particular street should amount to ten per cent. of the cost of installation in any one year. The amount claimed in the three causes of action is \$19,815.78. It bases its express contract upon resolutions passed by the water board of East Cleveland to the effect that proposal on the part of

*Affirmed, *Frisbie Company v. City of East Cleveland*, 98 Ohio State.

plaintiff to install water pipe on the several streets by the plaintiff be accepted, provided the cost does not exceed the village engineer's estimate and the work is done subject to the approval of the engineer and inspectors of East-Cleveland village. It was further provided by resolution that when the water rentals of any line of pipe on any street thus constructed shall equal ten per cent. of the cost of construction, the board will, if in funds, repay the Frisbie Company the cost of construction; that in pursuance of these resolutions and permission granted, pipes were laid on a number of streets in the years 1902 and 1903 at a cost in amount above stated; that in the year ending March 1, 1915, the water rentals received by the city from each of the separate systems aggregated a sum in excess of ten per cent. of the cost of installation; that the plaintiff duly tendered to the defendant a deed conveying to the city all its interest in the said water systems so installed by it and requested payment as per resolutions of 1901 and 1902; that the city council refused to pay them.

In the fourth cause of action it is claimed that the city has converted to its own use the water systems above referred to, installed by plaintiff on various streets in said city, and claims the right of recovery on the ground of conversion.

Trial was had below, a jury waived and the trial resulted in judgment for plaintiff for the amount above stated, from which judgment error is prosecuted to this court to reverse the same.

- The first three causes of action are predicated upon an express contract with the city, as claimed, to pay for the installation of said water system when the rentals should amount to ten per cent. of the cost.

The powers of the board of trustees of the water works of villages are derived from and limited by Sections 2407 to 2435, Revised Statutes of 1900, inclusive. The defendant was a village at all times covered by the series of the transactions involved in this lawsuit. Section 2415, R. S., provides and grants power to the board of trustees to make contracts, and reads as follows:

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"Section 2415. The trustees or board shall be authorized to make contracts for the building of machinery, water-works, buildings, reservoirs, and the enlargement and repair thereof, and the manufacture and laying down of pipe, and the furnishing and supplying with connections all necessary fire hydrants for fire department purposes, and keeping the same in repair, and for all other necessary purposes to the full and efficient management and construction of water works."

Section 2419 provides the rules and the manner and method whereby the trustees may enter into contracts, which reads as follows:

"Section 2419. The trustees or board, before entering into any contract for work to be done, the estimated cost of which exceeds five hundred dollars, shall cause at least two weeks' notice to be given, in one or more daily newspapers of general circulation in the corporation, that proposals will be received by the trustees, for the performing of the work specified in such notice; and the trustees shall contract with the lowest bidder, if in their opinion he can be depended on to do the work with ability, promptness and fidelity; and if such be not the case, the trustees may award the contract to the next lowest bidder, or decline to contract, and advertise again."

As we understand it, the board of trustees has only such power to make and enter into contracts, and may only enter into contracts in such manner, as the statute gives and provides.

Quoting from *Ravenna v. Penna. Co.*, 45 O. S., 118:

"Municipal corporations in their public capacity possess such powers and only such as are expressly granted by statute, and such as may be implied as essential to carry into effect those which are expressly granted."

To the same effect is *Board of Health v. Greenville*, 86 O. S., 24.

At the time the resolutions were passed by the village the streets through which and into which the plaintiff sought permission to extend water pipes had not yet been dedicated to the village and were at the time the property of the plaintiff. It is claimed that, therefore, Section 2419 did not apply, for

the reason that said section has reference only to cases in which the municipality is doing the work. It is urged that the streets being the property of plaintiff at the time avoided the necessity of competitive bidding. A number of cases are cited by counsel in which the necessity of competitive bidding was obviated, but an examination of these authorities will disclose the fact that the reasons assigned therefor were either that the subject-matter of the work was such that competitive bidding was impossible, or impracticable because of its artistic nature, or was monopolistic, or rested upon the use of some exclusive patent or franchise or sole source of supply. We do not think this doctrine has any application to the situation in the case at bar, for the laying of water pipes is not included within either of the actions referred to.

We are of the opinion that express contracts for the doing of work and the payment therefor under such circumstances as are claimed in this case, can only be accomplished to make the same binding upon both parties by a strict compliance with the statutes, particularly the two sections above quoted. *Newton v. City of Toledo*, 18 C. C., 756, affirmed without report, 52 O. S., 649. Quoting from the syllabus, paragraphs 1 and 3:

"Section 2419. Revised Statutes, defining the powers of water works trustees, which by the act of January 22d, 1889, is made applicable to the trustees of the natural gas works of Toledo, provides that 'the trustees of the board, before entering into any contract for work to be done, the estimated cost of which exceeds five hundred dollars (\$500), shall cause at least two weeks notice to be given in one or more daily newspapers of general circulation in the corporation.' Held: that the word 'work' in this statute includes material to be furnished; that a contract for the purchase by the Toledo gas trustees of pipe already manufactured and on hand, without advertising for bids therefor, was not in conformity with the requirements of Section 2419, Revised Statutes, and can not be enforced against the city.

"Although under Section 2415, Revised Statutes, the gas trustees of Toledo, the same as water works trustees, are empowered to make contracts, such power must be taken with the

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limitations prescribed by Sections 17 and 2702, Revised Statutes, and they can not enter into a contract without a fund applicable for the purpose provided for by tax assessment or otherwise, nor until a certificate of the city clerk is furnished that the money is in the treasury, and the city is not bound by contracts made in disregard of these provisions of the statutes."

Something is said in the petition to the effect that the village had established a custom of securing extensions to its water-works system in accordance with the method set forth in the petition in this case, and some reliance was placed upon this custom in the argument before us. However, we do not understand that custom can create a right or liability where none otherwise exists. Quoting from the syllabus of *Thomas v. Guarantee Title & Trust Co.*, 81 O. S., 432:

"Usage or custom can not create a contract or liability where none otherwise exists. A usage or custom can only be used to explain or aid in the interpretation of the contract or liability existing independently of it. It can not be permitted to contradict or vary express terms of a contract, nor to vary the legal import thereof."

It was further urged that the resolutions of the board of trustees were not contracts, yet in the petition those same resolutions are relied on as creating the contract sued on. The resolutions constitute the acts and only acts of the village upon which the right of recovery rests. In this manner the failure to observe the requirements imposed by statute upon the letting of a contract for work is evaded. If the board of trustees did in this case, by the proceedings had, impose upon the village, now city, of East Cleveland, the obligation to pay for the installation of these water systems, then a clever scheme and plan has been conceived whereby the requirements of the statute may be omitted. The board of trustees might very well provide in this manner for the extension of water pipes throughout the entire territory within the village limits and have the same constructed without competitive bidding, and a

decade or more later the inhabitants be obligated to pay without the obligation of any of the statutory safeguards having been applied at the time the obligation was incurred. We do not think that the board of trustees should be or can be permitted to do indirectly what the statute would forbid its doing directly.

It was said in argument that the plaintiff was never paid for the pipe installed. A deed in evidence discloses a provision therein to the effect that the plaintiff would cause water to be supplied to the residents on said street. It may be true that the cost of installation was not figured into the selling price of the lot, but it is equally true that each purchaser undoubtedly thought he was buying and paying for water pipes when he bought the lot, and undoubtedly thought that the cost thereof was included in the price paid.

The fourth cause of action is based upon conversion. It is admitted that the pipes were installed and attached by the plaintiff to the water works system of defendant. It did so with the permission of the defendant, and did so upon the condition that the same should be installed subject to the approval of the engineer and inspectors of the village. The pipes so laid became a part of the water works system of the village, under the circumstances of this case. Upon what theory conversion thereof may be claimed we are unable to understand. When the plaintiff installed the pipes and dedicated the streets of the village, with the pipes made a part of the village water system, plaintiff must recover upon an express contract the cost of installation, or has no cause of action at all. If the plaintiff has no valid contract as a basis for recovery, it has no claim to the pipes and no recovery can be had against the village for the value of the pipes. Courts will leave the parties where they placed themselves. *Buchanan Bridge Co. v. Campbell et al, Commissioners*, 60 O. S., 406.

There can be no recovery from the village upon a basis of an implied contract or on *quantum meruit*. *City of Welles-ton v. Morgan*, 65 O. S., 219; *McCormick v. City of Niles*, 81 O. S., 246.

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We are of the opinion under the facts of this case that the plaintiff did not have a legal, binding contract made according to law with the defendant; that in order to make a binding contract of the character herein claimed, the sections of the statutes quoted must be complied with, and a failure to comply therewith, which is admitted in this case, causes the transactions to fall far short of a legal contract. We understand that these sections must be complied with in all matters involving the construction or extension of a water system, and the only exceptions thereto are, perhaps, items of cost of operation. These statutes are the safeguards imposed by the Legislature for the protection of the tax-payers and citizens of a municipality. *Lancaster v. Miller*, 58 O. S., 575.

But the claim is made that these pipes were to be paid for by water rentals, the earnings of the water system. For the board to undertake to do so would be a mere subterfuge. One of two things would necessarily occur to do so: either the water rentals would have been maintained at a special and excessive figure to produce the sum required, thereby indirectly taxing all the water users of the village, or the water rentals would not have to be so raised as to amount to an excessive rental for the sole object and purpose of paying the amount due under this alleged contract. The citizens would foot the bills by permitting the trustees to do indirectly thereby what they are not permitted to do directly. The citizens of the village were entitled to have all the beneficial results of competitive bidding, if any, in the creation of an obligation imposed upon them for the construction or extension of their water works system.

We hold that the plaintiff has no express contract which is binding upon the village, now the city of East Cleveland; that the judgment below is contrary to law, and the same is reversed, with costs assessed against the defendant in error.

GRANT, J., and CARPENTER, J., concur.

CREDIBILITY OF ONE CONVICTED OF A FELONY.

Court of Appeals for Hamilton County.

THE CINCINNATI TRACTION V. FRED LIED.

Decided, November 19, 1917.

Charge of Court—Plaintiff Shown to Have Been Guilty of a Felony—Refusal of Trial Judge to Give a Special Instruction as to his Credibility.

It is not reversible error for the trial judge in a civil case to decline to give an additional instruction to the jury, defining the relation plaintiff's conviction of a felony bore to his credibility as a witness, where counsel failed to formulate any specific rule of law in their request that such a charge be given.

The plaintiff below recovered a judgment for damages resulting from injuries while a passenger alighting from a car of defendant company. A reversal of that judgment is sought in these error proceedings.

The plaintiff was the only witness who testified as to just how the accident occurred. No operative of the defendant company was called—the only witness offered by it being a claim agent who was unable to testify in relation to the accident itself. Numerous witnesses on behalf of plaintiff testified as to his injury and results therefrom, and medical evidence was introduced as to the fact that sarcoma had developed from a bruise, resulting in the necessary amputation of his leg.

The only evidence offered by defendant, other than the testimony of the claim agent, was a certified copy of an indictment of plaintiff for accepting a bribe while a public officer, a certified copy of the verdict finding him guilty, and a certified copy of the sentence of the court. The court in its general charge used the following language:

“You, the jury, are the sole judges of the facts, of the weight of the evidence and of the credibility of the witnesses. The evidence has to be weighed in the scales of credibility. You must

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consider whether the evidence is probable, or improbable whether it is sustained with reason and common sense as applying to the transaction, whether it appears that the testimony has been given frankly, openly and squarely, or whether it has been given otherwise. You will consider all the things that appeared in this case that ought to be considered in determining the credibility of the testimony that has been given to you by the various witnesses. You do not have to believe what a witness states just because he may have stated it, but you may disbelieve it altogether if you consider that the witness is unworthy of belief, or you may believe a part and disbelieve other parts; you should consider the interest, the motive, if there is any, which prompts a witness to testify, or you may consider the want of interest, whether or not a witness is disinterested and has no reason under all the circumstances for telling anything but the truth. The truth is the most sacred thing courts of justice deal with. There is not anything in a court of justice that is more shocking than an untruth. Therefore, gentlemen, while you are sitting in the jury box and acting under the solemn obligation you have undertaken, you have a sacred job to perform, and you know nothing but your conscience and your oath and your duty as members of this jury.

"You have a right to determine from the appearance of the witness on the stand, his manner of testifying, his apparent candor, his apparent intelligence, his relationship business or otherwise to the party, his interest if any may appear from the evidence, his temper, feeling or bias, if any, and from all these and all the other circumstances appearing in connection with the evidence produced at the trial, you, the jury, have the right to determine which witness is the more worthy of credit and to give credit accordingly."

At the close of the general charge, counsel for defendant made this statement to the court:

"I desire to call attention to an omission in the charge, and I request your honor to charge upon the relation of the conviction of the plaintiff of a felony, an infamous crime, as bearing on his credibility as a witness."

This request was refused and counsel for defendant excepted and also took a general exception to the charge.

Kinhead & Rogers, for plaintiff in error.

Belcher & Connor and *Simeon M. Johnson*, contra.

JONES, P. J.

Counsel insists that the trial court committed reversible error in refusing to make an additional charge to the jury in response to his request at the end of the general charge, defining the relation that plaintiff's conviction of a felony bore to his credibility as a witness; and he relies chiefly upon this so-called error to secure a reversal of the judgment below.

While under the common law one who had been convicted of an infamous crime was not permitted to testify, that harsh rule has been abrogated, and under our code all persons are competent witnesses except those of unsound mind and children of tender years. G. C. 11493.

In criminal cases it is provided, G. C. 13659:

"No person shall be disqualified as a witness in a criminal prosecution by reason of his interest in the event thereof, as a party or otherwise, or by reason of his conviction of crime. * * * Such interest, conviction or relationship may be shown for the purpose of affecting the credibility of such witness." * * *

There is no question, therefore, but that the plaintiff was a competent witness in this case. Defendant furnished to the jury ample proof of his conviction of the crime of bribery, and that being practically all of the testimony offered by defendant, it certainly must have been impressed upon the minds of the jurors as one of the important "circumstances appearing in connection with the evidence produced at the trial," from which the jury were directed by the court "to determine which witness is the more worthy of credit and to give credit accordingly."

It might have been proper for the court to instruct the jury that they could take into consideration the fact of his conviction in determining his credibility. *Conkey v. Carpenter*, 106 Mich., 1. But that was not necessary, and possibly might have been considered improper under the rule laid down in *State v. Tuttle*,

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67 O. S., 440, in which the fourth clause of the syllabus is as follows:

“It is not the province of the court, to classify witnesses, and give to the jury what the experience of the courts may be in respect to such a class, but their credibility should be left to the jury, under all the competent facts and circumstances of the case before it.”

No written charge in this respect was asked by counsel for defendant, as might have been done under clause 5 of Section 11447, G. C., nor was any distinct rule of law suggested or formulated by counsel in his request to the court at the close of the general charge. It was clearly the duty of counsel not only to call the court's attention to such omission as he claimed but, if he desired to found error upon it, to indicate clearly what he claimed the law to be and what charge he desired the court to give. It does not seem to be essential that this request should be in writing, but there must be some specific rule of law formulated in that request in order to predicate error upon its refusal. *Railway Co. v. Ritter*, 67 O. S., 53; *Whitaker v. Insurance Co.*, 77 O. S., 518, 522.

In the opinion of this court it was not prejudicial error in the trial judge to fail to add anything further to what had been said by him in the general charge on the suggestion made by the counsel for defendant below; and a careful review of the record fails to disclose any error to the prejudice of the plaintiff in error, and the judgment is therefore affirmed.

ORMAN, J., and HAMILTON, J., concur.

APPOINTEES OF A BOARD OF HEALTH.

Court of Appeals for Ashtabula County.

STATE, EX REL SCHMIDT, v. COLSON, AUDITOR.

Decided, September 2, 1918.

*Office and Officer—Appointive Positions in Health Department—
Abolished by Repeal of Ordinance Establishing Such Positions.*

The repeal of an ordinance, passed pursuant to the provisions of Section 4404, General Code, establishing a board of health, abolishes all appointive positions under such board.

H. G. Kingdom, for plaintiff in error.

J. E. Helman, contra.

METCALFE, J.

This is an action in mandamus to compel the defendant in error, W. B. Colson, as auditor of the city of Conneaut, to issue to the plaintiff in error, Karl Schmidt, a warrant for five months' pay as clerk of the board of health of said city. A demurrer to the petition was sustained by the court of common pleas.

The council of the city of Conneaut, under the provisions of Section 4404, General Code, passed an ordinance creating a board of health, and relator was thereupon appointed clerk of such board. Some time afterwards, however, the council repealed the ordinance, and relator claims that in spite of such repeal he is entitled to recover the amount of his salary from the time of the repeal of the ordinance until the end of his appointive term.

Section 4404, General Code, provides:

"The council of each municipality shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by council who shall serve without compensation and a majority of whom shall be a quorum." * * *

Section 4405 provides that if the municipality fails or refuses to establish a board of health or appoint a health officer, the state

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board of health may appoint a health officer and fix his salary and term of office, and grants to such officer the same powers and imposes upon him the same duties as health officers appointed in villages in place of a board of health.

It is urged that Section 4404, General Code, is mandatory, and that its requirement that the council shall establish a board of health has the force of a constitutional provision, so that when the council has acted in pursuance of the provisions of the law and established a board of health it can not abolish the board, or deprive the employees thereof of the emoluments of their respective offices, without further action on the part of the Legislature; in other words, that an ordinance of the council of a municipality, once passed, in pursuance of a grant of power by the Legislature, becomes of as much force and effect as a provision of the Constitution itself and must remain the law of that particular municipality until the Legislature grants the power of repeal.

We can not assent to this proposition.

Of course it goes without saying that the council of a municipality can only exercise the powers delegated to it by the General Assembly. But is a specific grant of power required to authorize the council to amend or repeal an ordinance which it had the power to pass? The efficacy of any legislative body would be entirely destroyed if the power to amend or repeal its legislative acts were taken away from it. The grant of the power to pass the ordinance in question, or any ordinance for that matter, carries with it the power to amend or repeal the same act.

The Constitution itself provides the method by which it may be changed.

The Legislature may repeal or modify an act which it has passed, and it seems to us to be utterly illogical to say that a municipality can not repeal an act of its legislative body, whether the power to repeal is expressly granted or not. And we think that the repeal of the ordinance creating the board of health also abolished all appointive positions under such board. *State, ex rel. v. Covington*, 29 Ohio St., 102; *State, ex rel. v. Jennings*, 57 Ohio St., 415; *McHugh v. Cincinnati*, 1 Cin. S. C. R., 145, and *State v. Brown*, 38 Ohio St., 344.

The judgment of the court of common pleas sustaining the demurrer to the petition is affirmed.

POLLOCK, J., and FARR, J., concur.

**OMISSIONS IN EXECUTION OF A WILL WHICH RENDERED
IT INVALID.**

Court of Appeals for Hamilton County.

KOCH ET AL V. MEYERS ET AL.

Decided, April 24, 1916.

*Wills—Failure to Properly Execute and Acknowledge—Undue Influence
Generally Shown by Circumstantial Evidence.*

1. Where, in an action to contest a will, it is evident from the testimony that the will was not read either to or by the testator, that it was not acknowledged by him, and that he had no knowledge of what it contained, it can not be said that such will was executed by the testator in such a manner as to comply with the requirements of Section 10505, General Code; and the verdict of a jury sustaining such will is not sustained by the evidence and will be set aside.
2. In an action to contest a will, issues relating to undue influence are generally determined upon circumstantial evidence and inferences drawn from a full presentation of facts which are inconclusive when taken separately, and a wide range of inquiry is therefore permitted to bring before the jury facts and influences bearing upon the preparation of the will.

*Cobb, Howard & Bailey and Henry L. Rockel, for plaintiffs
in error.*

Cogan, Williams & Ragland, contra.

JONES (Oliver B.), J.

The action below was brought to contest the will of Fred Mauntel, deceased, and resulted in a verdict and judgment sustaining the will.

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The decedent was a man fifty-four years of age. The cause of his death was diabetes, and he suffered from a carbuncle on the back of his neck which might be considered as a contributing cause of his death. His acknowledged sickness was of about two weeks duration, and he was under treatment by a physician for a period of only one week.

The evidence in regard to his mental condition during the last three or four days of his illness is quite conflicting. He died on Monday, about 7 P. M., having been in a coma for several hours before his death. The will in question was signed on Sunday, the day before, after 11 A. M. There is evidence that he had periods of stupor and delirium, at intervals, during at least two days prior to the day on which the will was signed.

The testimony of the attorney who drew the will and acted as one of the two witnesses is to the effect that when he went in response to a message to the home of testator for the purpose of drawing his will, he found him seated in a morris chair in the dining room, and after speaking to him, and being told that he desired a will drawn, he, the attorney, proceeded to draw the first part of the will, including the first item providing for the payment of debts, and then asked the testator but two questions: (1) "Whom do you want to leave your property to?" and (2) "Who do you want for your executor?" The answer to the first question was: "I want to leave it to Sophia Meyers. She is the best friend I ever had." The answer to the second was: "Make Dr. Sauer executor." Nothing was said as to any other relatives; nothing else as to his property or the terms of the will. The testimony of this witness as given in chief and on cross-examination is quite contradictory in regard to the execution of the will, but in the end he is positive that the will as written was not read to testator; but that after it was written it was handed by the attorney to the testator to read and sign, and that "he took it and scrutinized it before he signed it, and then signed his name to it." On being questioned further, the witness said that testator "scrutinized it," "just a second or two," and it is evident from his testimony

that the will was not read either to or by the testator, that it was not acknowledged by him, and that he had no knowledge of what it contained.

A careful consideration of all the evidence as to the execution of the will convinces all the members of this court that this will was not executed or acknowledged to be his will by the testator in such a matter as to comply with the requirements of Section 10505, General Code, and that it did not become a valid will under the law as laid down in the case of *Keyl et al v. Feuchter et al*, 56 Ohio St., 424, and *Tims v. Tims et al*, 14 C.C. (N.S.), 273. The verdict of the jury therefore in that respect is not sustained by the evidence.

Issues relating to undue influence are generally determined upon circumstantial evidence and inferences drawn from a full presentation of facts which are inconclusive when taken separately. A wide range of inquiry is therefore permitted to bring before the jury facts and influences bearing upon the preparation of the will. *Schouler on Wills* (5th Ed.), Section 242.

Two members of this court are of the opinion that the trial court erred in withdrawing from the consideration of the jury the question of undue influence. In their opinion sufficient facts were shown by the evidence to justify and require the submission to the jury of the question of undue influence, under the rule as recognized in *Wilder v. Taylor et al, Exrs.*, 87 Ohio St., 520. To this proposition Judge Gorman dissents.

For the reasons stated, the judgment below is reversed and the cause remanded for a new trial.

Judgment reversed, and cause remanded.

JONES (E. H.), J., and GORMAN, J., concur.

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**CONTRACTS OF EMPLOYMENT BASED ON SATISFACTION
BEING GIVEN THE EMPLOYER.**

Court of Appeals for Hamilton County.

FRANK B. STEWART, TRUSTEE, v. FRANK J. RUTTERER.*

Decided, December 20, 1915.

Employer and Employee—Construction of a Stipulation that the Work is to be Done to the Satisfaction of the Employer—Judgment of the Employer Controls, and Not that of "Reasonable Men."

Where a contract of employment provides that the work shall be done to the satisfaction of the employer, he is at liberty, acting in good faith, to discharge the employee without regard to the question whether the discharge would appeal to reasonable men as justified. *Highland Buggy Co. v. Parker*, 5 C.C.(N.S.), 383, and *Railway Co. v. Tierney*, 8 C.C.(N.S.), 521, affirmed without report, not followed.

Stephens, Lincoln & Stephens, for plaintiff in error.

Dolle, Taylor, O'Donnell & Geisler, contra.

GORMAN, J.

The defendant in error, Frank J. Rutterer, sought to recover damages for a breach of contract entered into between himself and the plaintiff in error as trustee. A verdict was rendered in his favor, and the defendant below, plaintiff in error here, prosecutes error to reverse the judgment.

The action grew out of an agreement between the parties hereto, made January 21, 1911, which in substance recited that Rutterer was indebted to the Standard Hay & Grain Company and the Winifrede Coal Company in the aggregate sum of about twelve thousand dollars and that he was unable to pay said indebtedness; and in consideration of the forbearance of the creditors to bring suit to collect their claims he transferred all of his property to Frank B. Stewart, as trustee, for the purposes set

*Reversing *Rutterer v. Stewart*, 17 N.P.(N.S.), 173.

out in the agreement, which were to continue and manage the business in which Rutterer was engaged, the feed and coal business, and to see if the debts of said business could be paid from the proceeds. Stewart was in the exclusive power to manage the business in such manner as he might see fit. It was further provided that in case it developed that the business was being continued at a loss, the trustee was authorized to sell all of the property, collect the accounts, convert the assets into money, and pay Rutterer's debts. There was also the following stipulation in the agreement:

"The party of the second part (Stewart) will employ the party of the first part (Rutterer) in connection with said business in any capacity except as common laborer, at a salary of \$15 per week so long as his services are satisfactory."

Upon the execution of the agreement Stewart took charge of Rutterer's business, employing Rutterer as manager, and he continued in such capacity for several months until on or about April 10, 1911, when Stewart wrote to Rutterer that he was not satisfied with his manner of conducting the business and had decided to employ one Zimmer as manager and give him full charge of the business. Mr. Rutterer was continued as a collector on the same wages until July 8, 1911, when he was discharged by Stewart.

The foregoing is a sufficient statement of the facts upon which the plaintiff bottomed his right to recover.

The sole question in the case to be determined by this court is, whether or not the trial court erred in refusing to give certain special charges, and erred in his general charge to the jury upon the question of the construction to be given to the contract providing for the employment of Rutterer "so long as his services are satisfactory."

The bill of exceptions is in the short narrative form and does not purport to contain all of the evidence, but there is sufficient in the bill to raise the questions of law upon which the rulings of this court are asked. Rutterer claimed that he was discharged without reason and arbitrarily, and the jury, under the charge, held with Rutterer.

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In substance the following charge, in two or three different forms, was asked by the defendant to be given to the jury before argument:

"By the contract between them, the defendant agreed to employ the plaintiff only so long as his services were satisfactory to defendant, and if the defendant was not satisfied with such services in good faith, after a fair trial, then your verdict should be for the defendant."

The court refused to give this charge, to which refusal counsel for defendant excepted.

The court in its general charge to the jury used the following language:

"The question, therefore, to be determined is, what is meant by the phrase in the contract 'so long as his services are satisfactory.' The law in that matter is this: a person who enters into a contract of employment, which is to continue as long as it is satisfactory, can hold his position only so long as the party to whose satisfaction he is to work is satisfied, and that satisfaction, or rather the dissatisfaction of the party for whom he is to work, and in this case for Stewart, must be dissatisfaction which would warrant Stewart in terminating the contract. This dissatisfaction can not depend upon a whim or a mere caprice, or be arbitrary on the part of Stewart, but it must depend upon such facts as would warrant a reasonable person in the same position that Stewart was, under the same conditions and circumstances, in coming to the conclusion that the services of Rutterer were not satisfactory.

"Now that, gentlemen, is the test; would a reasonable person placed in the same position that Stewart was placed have come to the conclusion that Rutterer's conduct, the work he was doing and the manner in which he was doing it, and all the surrounding circumstances of his employment, would such a person have come to the conclusion that his work was not satisfactory? If a reasonable person situated as Stewart was situated would have come to that conclusion, then Stewart was justified in discharging Rutterer. If a reasonable person would not have come to that conclusion upon all the facts that have been produced in evidence here before you, then he would not have been justified, and the plaintiff would be entitled to a verdict."

Counsel for the defendant took a general exception to the charge of the court.

In refusing to give the special charge above set out, we think the court erred.

We are also of the opinion that the court erred in the language employed in the general charge wherein the court said:

"This dissatisfaction can not depend upon a whim or a mere caprice, or be arbitrary on the part of Stewart, but it must depend upon such facts as would warrant a reasonable person in the same position that Stewart was, under the same condition and circumstances, in coming to the conclusion that the services of Rutterer were not satisfactory."

And again:

"Now that, gentlemen, is the test: would a reasonable person placed in the same position that Stewart was placed have come to the conclusion that Rutterer's conduct, the work he was doing and the manner in which he was doing it, and all the surrounding circumstances of his employment, would such a person have come to the conclusion that his work was not satisfactory? If a reasonable person situated as Stewart was situated would have come to that conclusion, then Stewart was justified in discharging Rutterer. If a reasonable person would not have come to that conclusion upon all the facts that have been produced in evidence here before you, then he would not have been justified, and the plaintiff would be entitled to a verdict."

It appears from this that the trial court read into the contract a rule of reason. And the trial court justifies the language employed in this general charge and the refusal to give the special charge, as shown by the opinion in 17 N.P.(N.S.), 173, upon the authority of two cases, *Highland Buggy Co. v. Parker*, 5 C. C.(N.S.), 383, and *Lake Shore & Western Railway Co. v. Tierney*, 8 C.C.(N.S.), 521, affirmed without report 75 O. S., 565.

The case of *Highland Buggy Co. v. Parker*, decided by the predecessor of this court, was an action to recover damages for the wrongful discharge of an agent of the company. In deciding the case the court, on page 385, uses this language, with reference to the contract of Parker:

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"The dissatisfaction which would warrant the company in terminating the contract could not depend upon mere whim or caprice, but upon such facts as would warrant a reasonable person in the conclusion that the services of the salesman were not promoting, either directly or indirectly, the interests of his employer, provided always that the latter acted in good faith and performed his part of the contract."

The contract under consideration in that case contained a provision, among other things, that Parker would give his entire time and attention to selling vehicles of the Highland Buggy Company at prices furnished him from time to time, and would promote the interests of the Highland Buggy Company, all to its satisfaction.

The case of *Lake Shore & Western Railway Co. v. Tierney*, 8 C.C.(N.S.), 521, was a case in which William Tierney had been an employee of the railway company, had received injuries and brought suit to recover for same. While that case was pending he entered into a compromise agreement in writing with the railway company whereby the railroad company, among other things, agreed to employ Tierney in consideration for Tierney's dismissing his action, and that said company was to employ him so long as his services were satisfactory. The company discharged him, and he brought an action to recover damages for the wrongful discharge. The Circuit Court of Allen County, passing upon the case was called upon to determine the correctness of a charge asked to be given to the jury on behalf of the company and held as follows:

"The court was asked to charge the jury that the company was to be the sole judge of the services rendered, and, if in good faith it decided that his services were unsatisfactory it had the right to discharge the plaintiff at any time."

The court said:

"This does not fairly state the case. The defendant may have been dissatisfied and may have thought that it had reason for dissatisfaction, and may have acted in good faith and so discharged plaintiff, and yet it may have been requiring unreasonable things; it may have been misinformed as to his conduct

and so may have become dissatisfied without good cause, yet in perfect good faith. This contract should not be construed from one side alone, and the court properly refused to do so in this respect. Each party had his rights and obligations. The obligations as well as rights of each must be considered. The charge as requested did not in our judgment meet this test."

The trial court in case at bar also relied upon the statement contained in the decision of the Supreme Court in *Ashley v. Hanahan*, 56 O. S., 559, at page 570, where this language was employed:

"He (plaintiff) might, however, as suggested above, on an averment supported by evidence that the architect had fraudulently or unreasonably refused his certificate, recover by showing a substantial performance of the work as required by the contract." * * *

There are other cases in this state which hold directly opposite to the rule laid down in the two circuit court decisions above cited.

In the case of *Crigler v. Blair*, 4 C. C., 324, the circuit court, the predecessor of this court, speaking through Cox, Swing and Smith, held that where there was to be an exchange of property provided "a satisfactory title and abstract be furnished," the person to whom such title and abstract was to be furnished was the sole judge of the satisfactory character of the same.

In the case of *Karsner v. Union Central Life Insurance Company*, 12 C. C., 394, where the decision was by the same court that decided the Tierney case, it was held:

"Where the contract between an insurance company and one of its general agents for a fixed period of years provides, 'That whenever the amount of new business done by the agent is, in the opinion of its officers, unremunerative; or, when the business of the company is not conducted in a manner satisfactory to the officers, they may cancel the contract' * * *, it is for the officers alone to decide, if acting in good faith, when the condition arises for such cancellation."

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The General Term of the Superior Court of Cincinnati in *Elsas v. Meyer*, 21 Bull., 346, held that the question of the reasonableness of the employer's dissatisfaction was not involved in the case, but only the question as to whether or not he acted in good faith in the discharge.

The district court of this county, predecessor of the circuit court, in the case of *Sargent v. Sibley*, 11 Bull., 177, decided in an opinion by Avery, J., that where a contract for the sale of real estate provided that the title was to be satisfactory to the purchaser's attorney, the opinion of such attorney was conclusive. The court say:

"As a general rule, where it is stipulated in a contract that what is to be done by one party shall be to the satisfaction of the other or of a third person, the decision of such other party or person is final."

There have been a great number of cases in other jurisdictions upon this question, but the rule seems to be well laid down in Labatt's Master and Servant, 2d Ed., Section 198, pages 618-619:

"In one group the facts, that the performance of the contracts in question involved the gratification of the employer's personal taste, is adverted to in terms which show more or less distinctly that this element was specifically treated as being the determinative element. But the courts did not use any language from which it can reasonably be inferred that they considered his judgment to be final only in cases where the contract is of this description."

In Section 199, page 630:

"The position taken in Ohio is that the dissatisfaction which will warrant a discharge must be a reasonable dissatisfaction, and not an arbitrary one, and that the good faith of the master in claiming the given services to be unsatisfactory will not render a discharge justifiable, if the services performed were such as ought to have been satisfactory to a reasonable employer." (Citing 8 C.C.[N.S.], 521.) This decision is obviously opposed to the general current of authority."

We are of the opinion that this rule laid down in the Tierney case (8 C.C.[N.S.], 521), is clearly against the great weight of

authority, and we are not disposed to follow the ruling in that case, nor the rule laid down in the Parker case, *supra*. We hold that where the contract provides, as did the one in the case at bar, that the work is to be done to the satisfaction of the employer, the employer has the right to discharge the employee, provided he acts in good faith, whether or not the cause for the discharge is such as would appeal to a reasonable man. If any effect is to be given to the provision of the contract which requires the employer or employee to be satisfied, it would appear that the one to be satisfied is the one to determine whether or not he is satisfied, and not the court or jury. The parties having made their contract, it is not the province of the court to unmake it or to make a different contract by construing it to read that "satisfaction" or "dissatisfaction" should mean the "satisfaction, or dissatisfaction, of a reasonable person."

We think the law of Ohio upon this question should be in harmony with the law laid down in the great majority of the state and federal courts. We might cite numerous authorities to support the conclusion at which we have arrived, but we deem it unnecessary. The authorities will all be found collected in the notes under Sections 198-199, Labatt's Master & Servant, 2nd Ed., Vol. I.

For the reasons given, the judgment of the court of common pleas will be reversed, and the cause remanded for a new trial.

JONES (E. H.), J., and JONES (Oliver B.), J., concur.

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Licking County.

A LAPSED LEGACY.

Court of Appeals for Licking County.

WILLIS A. ROBBINS ET AL, ADMINISTRATORS, v.

DAVID H. PIGG ET AL.*

Decided, March Term, 1918.

*Wills—Widow Not an Heir Per Stirpes of Her Deceased Husband—
Legacy Left to Him Held to have Lapsed—Section 10581.*

Under a bequest to four legatees named in the will of a testator "or their heirs *per stirpes*, each the sum of \$1,100 absolutely" the widow of one of the legatees, whose death without issue surviving, preceded the death of the testator, does not take as the heir-at-law of the deceased legatee, neither do the three surviving brothers take said legacy by reason of their relationship to said deceased legatee, but the said legacy lapses under the general law relative to wills and becomes the property of the residuary legatee.

Kibler & Kibler, for plaintiffs.

Fitzgibbon, Montgomery & Black and Norpell & Norpell, contra.

POWELL, J.

This action is in this court by appeal from the judgment of the court of common pleas of this county. It was brought in that court by the plaintiffs, who are administrators with the will annexed of the estate of one Sidney Smith, deceased, asking the direction of the court relative to the discharge of their duties as such administrators, and is brought under the special provisions of Section 10857 of the General Code. The facts on which the question in controversy arises are as follows:

Sidney Smith, the testator, died testate on the 9th of September, 1916. His will had been executed on the 26th day of May, 1900. He died without issue, his wife having died several years before his death. In the third item of his will he provided as follows:

* Affirming *Robbins et al, Admrs., v. Pigg et al*, 21 N.P.(N.S.), —.

"Item 3. I give and bequeath to Charles A. Pigg, William Pigg, Geo. T. Pigg and David H. Pigg, or their heirs, *per stirpes*, each the sum of \$1,100 absolutely, which said amount I received from my wife by inheritance, she having been a sister of the legatees mentioned in this item."

William Pigg, one of the legatees mentioned in said item, died on the 30th of April, 1916, intestate, and without issue, leaving the defendant, Dora Pigg, his widow, who was his sole heir at law. Dora Pigg claims as such heir that the \$1,100 legacy, given to her deceased husband by the will of said testator, should be paid to her. The defendants, David H. Pigg, Charles A. Pigg and Geo. T. Pigg, who are named in said Item 3 and who each received the legacy of \$1,100 therein given to them, claim that by the terms of said will they are entitled to the said legacy. Ella Smith, who is the residuary legatee of the said testator, by virtue of Item 7 of the will, also claims to be entitled to receive said legacy.

The plaintiffs in this action ask the direction of the court as to who is entitled to the same. Said Item 3 gives to the four legatees named therein the sum of \$1,100 each absolutely. The legacy given to William Pigg by said Item 3 lapses and becomes a part of the residuum of the estate of said testator, unless the will itself otherwise provides. Dora Pigg claims to be the heir at law of said William Pigg, and that a proper construction of said Item 3 would give the same to her as such heir at law. This court is of opinion otherwise. While she is the heir at law of William Pigg, she is not entitled to a legacy given to him, but which never came into his possession, by reason of his death having occurred before the death of the testator. There is nothing in said item which indicates that the said testator desired that William's widow should receive the legacy given by him to William. The language of said item applicable to the legacy of William Pigg is as follows: "I give and bequeath to William Pigg, or his heirs, *per stirpes*, the sum of \$1,100 absolutely." Dora Pigg is not an heir *per stirpes* of William Pigg. She is his heir at law by virtue of the statute, and by reason of having survived him without leaving issue. If she is

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entitled in any way to this legacy, it is because the language of the will itself makes her a legatee under the will of said testator, and there is nothing in the will which indicates that the testator intended to give this legacy to her in the event that William Pigg should die before the death of the testator. In other words, she is not his legatee; neither is she entitled to receive said legacy as the general heir at law of William Pigg; neither is she entitled to said legacy as being heir *per stirpes* of William Pigg.

It is further claimed that the surviving brothers of William Pigg, named in said Item 3, are entitled to said legacy, because by the terms of the will it is shown to be the intention of the testator that the amount of money received by him from his wife as an inheritance should be repaid to her brothers out of his estate. We do not subscribe to this view. The testator executed two codicils to his will, and it is recited in each of them that in his lifetime he paid the legacy given by said will to David H. Pigg "in full of said legacy, the same having been paid in advance to him"; and further, that so much of said will as gave a legacy to said David H. Pigg is canceled, and the legacy itself is declared adeimpted or satisfied. In the second codicil he again recites that he had paid to David H. Pigg the sum \$1,100 provided to be paid to him by said Item 3; and further he says, "I hereby cancel and annul the part of said Item 3 which provides for the payment of that amount to him." He further adds, as a part of said codicil, that his original will, as modified by said codicil, is now his last will and testament. We think from this circumstance that the said testator did not intend to give the specified sum of \$4,400 to the brothers of his deceased wife, but that he meant simply what he said: That he gave to them each the sum of \$1,100. There is nothing in this will that shows any intention in the mind of the testator to give said total sum to the brothers of his wife as a class; and, in fact if such a construction should be placed upon the will it would be in conflict with the other provisions of said codicils, as above quoted.

It is the settled law of Ohio that a legacy given to a legatee who is either dead at the time of making the will or dies there-

after, before the death of the testator, lapses and becomes a part of the residuum of his estate; or if this is not true, that the testator dies intestate as to such legacy. There is a provision of the statutes which seeks to prevent the lapsing of legacies in certain contingencies. I refer to Section 10581 of the General Code. But none of the conditions prescribed by this section of the statutes is applicable to the provisions of this will. In the first place, Dora Pigg, the widow of William Pigg, is not the issue of William Pigg, as provided in said section. Neither is she of any degree of relationship to the said testator. So that, as far as she is concerned, there is nothing which prevents the lapsing of the legacy. Neither does it descend to the three brothers living for the same reason. There is nothing which appears in said will which shows an intention to give the same, or any part thereof, to said legatees.

So there is nothing in the relationship of the parties which prevents the legacy from lapsing. (*Schaeffer v. Bernhardt*, 76 O. S., 443.) There being no special rule applying to the claims of any of said parties, the legacy lapses under the general law relative to wills, and according to the terms and provisions of Item 2 of said will, the same becomes the property of the residuary legatee, Ella Smith.

A decree may be drawn in her favor in accordance with the opinion herein expressed.

HOUCK, J., and SHIELDS, J., concur.

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Richland County.

**POWER TO CONVEY PROPERTY BEQUEATHED TO
CHILDREN FOR LIFE.**

Court of Appeals for Richland County.

LAVER V. KREITER ET AL.*

Decided, January 29, 1917.

Wills—Life Estate Created in Sons—With an Estate in Fee Simple in Grandchildren—Invalidity of Conveyance by Grandson Before Title Had Accrued in Him.

Where a will creates an estate for life in certain real estate in relator's two sons in equal shares, an estate for life in the survivor of said two sons in the whole of said real estate, and at the death of such survivor an estate in fee simple in equal shares to the heirs of the body of each of said sons, and further provides that if, at the death of such survivor, the heirs of the body of either are deceased, the whole estate shall pass to the heirs of the body of either then surviving, no estate passes to the children of said two sons of the testator until the death of the survivor, and a deed by one of said children made prior to the death of the survivor of testator's two sons passes no title to such real estate.

Heard on appeal.

Philip Laver, a former resident of Richland county, died testate on the — day of November, 1898, seized of certain real estate in the petition described. He was survived by two sons, Philip J. Laver and George M. Laver, who were his next of kin and heirs at law. Philip J. Laver died in 1908, leaving the plaintiff, Edith Laver, his only child and sole heir at law, and George M. Laver died on November 5, 1915, leaving the defendant Harold A. Laver, his only child and heir at law.

The action is in partition. The parties are the plaintiff, the defendant Harold A. Laver, and other defendants claiming title or right to the undivided half of said premises, or the proceeds of the same, through conveyances from said Harold A. Laver. The rights of the parties are based on the will of Philip Laver and the deed of said Harold A. Laver, of date December 2, 1912.

There is no question as to the rights of the plaintiff, Edith Laver, it being conceded that she is entitled, on distribution, to one-half of the proceeds of sale of said premises.

All the questions presented for adjudication are raised on the construction of items two and three of the will of Philip Laver. Said items are as follows:

"Item 2. I will and devise to my two sons, George M. Laver and Philip J. Laver, the equal use and enjoyment of the rents and profits of my real estate during their natural lives, or during the natural life of the surviving one of them, in case of death and at the decease of the surviving one of them, to descend as hereinafter designated in item three.

"Item 3. At the decease of my said two sons George M. Laver and Philip J. Laver, or the surviving one of them, I will and devise my real estate in item two referred to, to the heirs of the body of my said sons, namely, the children of my said son George M. Laver, the share to which he would be entitled, and to the children of my said son Philip J. Laver, the share to which he would be entitled, if living, and if at the decease of the surviving one of my said sons, George M. and Philip Laver, the heirs of the body of either shall have deceased, then I devise to the heirs of either so surviving, their heirs or assigns, said real estate in fee simple."

It is contended on the part of Harold A. Laver that at the time he made his quit-claim deed to the defendant, Martin Kreiter, he had no interest in said real estate that he could alienate, his father being still alive; while it is contended on the part of Martin Kreiter, and those claiming under him, that Harold A. Laver was then vested with a fee simple title to the half of said real estate, subject, however, to defeasance in the event of his death before the death of his father, George M. Laver.

H. T. Manner and C. H. Workman, for plaintiff.

Van C. Cook, C. E. McBride and W. H. Gifford, contra.

POWELL, J.

The facts out of which the controversy in this case arises, and the controversy itself, are clearly presented in the above statement of facts, and, while there are other issues presented by

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the pleadings, they are subordinate to the question of the right and authority of Harold A. Laver to sell and convey the said real estate at the time he attempted to convey the same to Martin Kreiter. Items two and three of the will of Philip Laver create the following estates in said lands:

1. An estate for life in testator's two sons, George M. and Philip J. Laver, in equal shares.

2. An estate for life in the survivor of said two sons, George M. and Philip J. Laver, in the whole of said real estate.

3. At the death of such survivor an estate in fee simple to the heirs of the bodies of said George M. and Philip J. Laver, in equal shares to the heirs of the body of each of said sons.

4. If, at the death of such survivor, the heirs of the body of either are all deceased, the whole estate is given to the heirs of the body of either then surviving.

It will be noticed that the fee simple title from testator's death until the death of his surviving son is not vested anywhere, by the terms of the will. It therefore descended by operation of law to the heirs at law of the testator, viz., George M. and Philip J. Laver. It could not pass to Edith Laver or Harold A. Laver, as they were not heirs at law of the testator. It could only pass to them by the terms of the will itself. It did not so pass because the will fixes the death of the survivor of testator's two sons as the date when the fee simple title should pass, and then not to Edith and Harold A. Laver, individually, but to the heirs of the bodies of George M. and Philip J. Laver, as a class. Edith and Harold A. meet the requirements of the will as to the class that should take said estate at the date fixed, viz., at the death of George M. Laver, which occurred on the 5th day of November, 1915.

Harold's deed to Martin Kreiter was made December 2, 1912, nearly three years before any title whatever accrued to him under the will of Philip Laver.

We are of the opinion that the deed of Harold A. Laver to the defendant Martin Kreiter did not convey to the grantee named in said deed any right or title to the real estate in controversy.

The estates created by the will of Philip Laver are in legal effect entailed estates, giving to the first takers an estate for life only, and to the issue of the first takers, or to the heirs of their bodies, an estate in fee simple.

A rule of construction for such cases is laid down in the cases of *Dugan v. Kline et al*, 81 Ohio St., 371; *Dart v. Dart*, 7 Conn., 250, and *Carter v. Grossnickle*, 11 N.P.(N.S.), 465, affirmed without opinion, 88 Ohio St., 577.

Under these authorities Harold A. Laver had no interest in said lands that he could alienate. Neither is anything pleaded or shown by the testimony that would operate as an estoppel against him.

Kreiter having paid certain money for the benefit of Harold A. Laver, he ought, in equity, to have the same repaid to him, and this would be so ordered. The same decree may be entered in this court as was entered in the court of common pleas.

Judgment rendered in favor of defendant Harold A. Laver and against all other defendants, excepting as to the money ordered repaid to Martin Kreiter.

HOUCK, J., and SHIELDS, J., concur.

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Hamilton County.

**CHILD OF DECEASED CHILD WITHOUT INTEREST IN A
POLICY OF LIFE INSURANCE.**

Court of Appeals for Hamilton County.

WILLIAM LUCKING, AN INFANT, BY EMMA LUCKING, HIS
GUARDIAN AND NEXT FRIEND, ET AL V. THE MUTUAL
BENEFIT LIFE INSURANCE COMPANY ET AL.*

Decided, February 4, 1918.

Life Insurance—Provision for Payment of Proceeds to Children Strictly Construed—No Interest Passes to the Children of a Deceased Child, When.

Grandchildren have no interest in a policy of insurance made payable to their grandmother, or in case of her death before that of the insured then to her children, where the death of the parent through whom they claim preceded that of their mother.

Matthews & Klein, John A. Scanlon, Chas. M. Leslie and Clarence M. Smith, for plaintiff in error.

Vorys, Sater, Seymour & Pease, Wilbur E. Benoy, A. C. Gallagher, John K. Kennedy and Clarence M. Smith, contra.

JONES, J.

A policy of life insurance for \$5,000 was issued by the defendant company December 3, 1880, upon the life of Joseph Lucking, payable within ninety days after due notice and satisfactory proof of his death to his wife, Elizabeth Lucking, or in case she should die before the decease of her husband then the amount of said insurance should be payable to their children or their guardian.

Elizabeth Lucking died December 6, 1913.

Elizabeth and Joseph Lucking had in all five children as follows: Alexander and Gertrude C., who died in infancy without issue, on June 30, 1876, and March 31, 1882, respectively; Leo Lucking, who is still living; Joseph Lucking, Jr., who died

*Affirming *Lucking et al v. Life Insurance Co.*, 21 N.P.(N.S.), —.

February 24, 1914, without issue, leaving a widow, Barbara Lucking; Lawrence Lucking, who died July 11, 1912, leaving three children, one of whom, Homer, died July 16, 1914, and the other two, William Lucking and DeWitt H. Lucking, are still living.

Plaintiffs allege that on November 27, 1914, in violation of their rights in said policy of insurance, it was canceled and annulled by the said defendant company upon the written release of the insured Joseph Lucking and his son Leo Lucking, said company then paying to them the sum of \$2,666.75 in cash as consideration for the release and delivering up of said policy of insurance.

William Lucking and DeWitt H. Lucking, infants, by their next friend, and Barbara Lucking, are the plaintiffs; and cross-petitions were filed by the administrators of Joseph Lucking, Jr., Lawrence Lucking, Alexander Lucking and Gertrude C. Lucking. The petition and all of said cross-petitions allege that all of the conditions of the policy of insurance had been performed upon their part at that time, and that they have been damaged by the action of said defendant company in cancelling and annulling said policy of insurance, said parties claiming that they should have participated in the surrender value thereof which instead was improperly paid in full to said Joseph Lucking and Leo Lucking.

Demurrers were filed by the defendant, to plaintiffs' petition and to the several cross-petitions, and upon argument said demurrers were each sustained and final judgment was entered below in favor of the defendant. Plaintiffs in error seek reversal of that judgment.

Exhaustive and elaborate arguments have been made as to the question of the respective interests of the parties in this policy and the vested rights that accrue to a beneficiary of such an insurance policy.

The case was decided upon the technical wording of the policy, that Elizabeth Lucking being dead and Leo Lucking being the only surviving child at the time of the surrender he was the only beneficiary then interested in the policy.

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So far as the administrator of Alexander Lucking is concerned there is no question but that he had no interest at any time in said policy because it was issued several years after his death.

Gertrude C. Lucking also, who died before her mother, could in no way participate in said policy.

So far as the claim of the administrator of Joseph Lucking, Jr., is concerned, the case of *Ryan v. Rothweiler*, 50 O. S., 595, is conclusive, and no interest can be allowed on his behalf.

The claims that are not disposed of by *Ryan v. Rothweiler* are those made on behalf of the children of Lawrence Lucking, who survived their grandmother, Elizabeth Lucking, and are still living, namely, William Lucking and DeWitt H. Lucking.

This court had occasion to look into this question, although it was not there necessary to decide it, in the case of *Schuermann v. Twachtman*, 24 C.C.(N.S.), 459, wherein it was stated that, in the absence of Ohio decisions, if it were necessary to construe such policy we should be inclined to follow the rule laid down in the case of *Continental Life Insurance Co. v. Palmer*, 42 Conn., 60, and other cases there referred to, as carrying out the natural intention of the parties and being more in accord with the law of descent and distribution. As a matter of principle we see no reason to change that view.

Two unreported cases were referred to in that decision: *Frank v. Bauman*, 54 O. S., 621, and *Dovel v. Dovel*, 69 O. S., 576, which are relied upon here on behalf of defendants in error. Both of these decisions are without report other than the statement that they are decided on the authority of *Ryan v. Rothweiler*.

Certain notes in regard to *Frank v. Bauman* are published in 35 W. L. B., 59. An examination of the record, however, in that case shows that while one of the parties in that case was a granddaughter, Bessie Frank, occupying a position similar to that of William Lucking and DeWitt H. Lucking in this case, no cross-petition in error was filed in her behalf, and the only error proceeding before the Supreme Court was that of her mother's administrator; so that the question in that case as it

was presented to the Supreme Court was strictly within the facts of *Ryan v. Rothweiler*.

The record of the case of *Dovel v. Dovel* clearly shows that Lizzie O. Dovel was a grandchild occupying a position similar to that of William and DeWitt H. Lucking in this case, and there the question was squarely put to the Supreme Court in the same manner in which this case is presented to this court. The judgment of the circuit court was there affirmed by the Supreme Court, adjudging that she was not entitled to participate in the proceeds of the policy.

While the *Dovel* case, so far as we have been advised, has not been reported in either the circuit court or the Supreme Court, through the industry of the librarian of the Cincinnati Law Library a published copy of the record and briefs which were used in the Supreme Court has been made available to this court. We understand from its repeated declarations that the attitude of the Supreme Court as to the binding force of unreported cases has not been modified, yet in the recent case of *Bumiller v. Walker*, 95 O. S., 351, the following language is used in the opinion of the court:

“Ordinarily this court does not regard its unreported cases as judicial authority, for the reason that it is generally impossible to ascertain the concrete legal propositions involved and decided; but where a single question is involved, and that succinctly stated and decided, it can not be said that such unreported case is wholly without influence.”

This *Dovel* case having been brought to our attention by the briefs of counsel and the same question having apparently been the basis of the Supreme Court's decision there, we feel bound under the rule of judicial subordination, regardless of any contrary view of the law we might otherwise be inclined to hold.

We therefore hold that no error was committed by the court below in sustaining the demurrers, and its judgment is affirmed.

GORMAN, J., and HAMILTON, J., concur.

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INJUNCTION BINDING ON REORGANIZED COMPANY.

Court of Appeals for Franklin County.

THE FARMERS FERTILIZER CO. v. RUH ET AL.

Decided, February 13, 1917.

Injunction—Standing Against a Corporation—Operative Against the Reorganized Company, When.

Where the property and business of a corporation is transferred to and accepted by a new corporation of the same name and with the same managing officers, an injunction issued and in force against the old company prior to and at the time of the transfer is binding upon the new company while managing the plant and property so acquired and engaged in the same or similar business, thereon, although the order of injunction did not expressly include the officers, agents and assignee of the original company.

J. E. Todd and George H. Jones, for plaintiff in error.

D. N. Postlewaite, contra.

ALLREAD, J.

On August 16, 1911, the Farmers Fertilizer Company, a corporation owning a commercial fertilizer plant, was, at the suit of residents of the vicinity, enjoined "from doing anything upon its premises that will set free offensive smells, stenches and noxious vapors."

In the month of November, 1915, a new corporation was formed. By consent of the old corporation the same name was used. A majority of the stockholders of the old company were stockholders of the new company.

The chief officers and six directors of the old company were chosen to like positions in the new. The corporate purpose of the new company was substantially the same as the old, to-wit, dealing in and manufacturing fertilizer and the ingredients thereof and kindred products.

The old company sold its property and plan to the new company, which took possession of the plant, erected new buildings

thereon, and largely changed the business thereof—from a commercial fertilizer to a sulphuric acid plant. Upon affidavit and complaint the new corporation was cited to answer for violation of the injunction, and upon a hearing was convicted.

Counsel for plaintiff in error contend that the conviction was unlawful:

1. Because there was a new company in possession and charge, not a party to the original case, nor named nor included in the injunction.

2. Because the business from which the noxious vapors and stench are claimed to have emanated was a new business conducted in new buildings and not described in the original petition and order of injunction.

While it is true that the restraining order was directed against the original corporation and did not expressly include its agents, successors or assigns, yet we are of opinion that the injunction operated against its controlling officers and managing agents. 3 Cook on Corporations (7th Ed.), Section 755.

This arises out of the very nature of the case. A corporation can not act except through its officers and agents and can not act in opposition to the will of its directors and stockholders.

The reincorporation of the Farmers Fertilizer Company was for convenience in the transaction of business. Its controlling officers and stockholders were practically the same.

A corporation is defined to be:

“A collection of many individuals, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual.” *State, ex rel, v. Standard Oil Co.*, 49 Ohio St., 137, 178, and *First Natl. Bank v. Trebein Co.*, 59 Ohio St., 316, 327.

The fiction that a corporation is a legal entity separate and apart from the individuals composing the corporation is introduced for convenience of the corporation in the transaction of its business. For many purposes, however, the fiction may be disregarded and the corporation held to be the individuals composing it.

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In the case at bar the new corporation succeeded the old in the ownership of the property and plant and in the conduct of the business. The new corporation was controlled by officers and agents and stockholders who were bound by the injunction, and who were acting under a charter. Looking at the new company as a collection of individuals, it would be subject to the injunction. It is a case, therefore, where the fiction of reincorporation should, as to the injunction, be disregarded. Besides, even if the new corporation were a new entity, the circumstances of the transfer of title and the knowledge of the officers and agents of the new company would hold them liable to the injunction of which they had notice, and which affected the management of the business to which they had succeeded. *Miller et al v. Toledo Grain & Milling Co.*, 21 C. C., 325; *In re Lennon*, 166 U. S., 548; 22 Cyc., 1012, and 3 Cook on Corporations (7th Ed.), Section 755.

There is a conflict of authority upon the proposition as to whether agents or third parties not named in the order of injunction can be held for contempt, but we think that the weight of authority sustains the conclusion herein announced.

While it is true that the business of the new corporation has been changed, yet it is a kindred business and employs a process productive of stenches and noxious vapors similar in character to those arising out of the business conducted by the old company.

The order of injunction was very broad. While the petition under which it was granted described the business of the old company, yet the injunction as modified was "from doing anything upon said premises that will set free offensive smells, stenches and noxious vapors." This broad injunction was within the scope of the prayer of the petition and remained valid until modified.

The change of business did not, therefore, exonerate the new corporation from the injunction.

It therefore follows that the judgment of the court of common pleas should be affirmed.

FERNEDING, J., and KUNKLE, J., concur.

EFFECT OF CONTINUING IN POSSESSION BY ONE HOLDING
OPTION TO RENEW LEASE.

Court of Appeals for Hamilton County.

GROSS V. CLAUSS.

Decided, June 1, 1915.

*Landlord and Tenant—Lessee Holding over under an Option so to do
Becomes Bound for a New Term—Notice of Intention to Exercise
Option Not Necessary.*

1. A lease for a term with a privilege or option in the tenant of a renewal or extension for a further term upon the same terms and conditions, is a present demise as to the renewal to begin at a future time, and under such covenant no new lease need be required, but any indication on the part of the tenant of his intention to avail himself of his privilege operates to extend to him the right of the additional term.
2. A lease contained a provision that if the lessee should have performed all the conditions of the lease then upon its expiration the lessee should have the privilege of renewing the same for a four-year term upon the terms and conditions of the original lease. Upon the expiration of the original term the lessee remained in possession of the premises without anything being said or done by either of the parties with reference to a new lease, no notice being given by the lessee of his intention to exercise his option or privilege of a renewal. Lessee continued to occupy the premises and pay the rent for three months after the expiration of the original term. *Held*: That the lessee by continuing in possession of the premises and paying the stipulated rent without notifying the lessor of his intention not to make his election to renew, thereby bound himself for the term of four years from the date of the expiration of the original lease.

E. A. Hafner and Walter C. Muhlhauser, for plaintiff in error.

W. A. Rinckhoff, contra.

GERMAN, J.

This is a proceeding in error to reverse a judgment of the municipal court of Cincinnati, in favor of defendant in error.

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The action below was one to recover \$125 rent claimed to be due under a lease between defendant in error, Elizabeth Clauss, the lessor, and plaintiff in error, George P. Gross, lessee.

The lease was in the usual form, containing the usual covenants, and was duly signed, attested, acknowledged and recorded. The term was for one year from October 1, 1911, at a yearly rental of \$300 payable in monthly installments of \$25 in advance. There is the following proviso in the lease: "provided that if the said lessee shall have performed all the conditions of this lease, that said lessee shall have the privilege of renewing the said lease for the term of four years from Oct. 1, 1912, upon the same terms and conditions herein set forth."

Upon the expiration of the term of one year the lessee, Gross, remained in possession of the premises without anything being said or done by either of the parties with reference to a new lease, and no notice being given by the lessee of his intention to exercise his option or privilege of a renewal. Lessee continued to occupy the premises thereafter, and to pay the \$25 rent each month, down to December 31, 1912, three months after the expiration of the original term. On December 31, 1912, he notified the lessor of his intention to relinquish the premises and remove therefrom, but he continued to pay the rent monthly down to September 1, 1913, although he had vacated on December 31, 1912. The premises continued vacant thereafter down to February 1, 1914. The action was for the recovery of the rent for the five months, September, October, November and December, 1913, and January, 1914, upon the claim of the lessor, Mrs. Clauss, that by holding over his term, and nothing being said as to a renewal, the lessee thereby made his election to take the premises under his privilege of renewal for the further term of four years. The court below held with the defendant in error in her contention, and found that by holding over his term under the circumstances shown the lessee became bound for the additional four years. In this holding we are of the opinion that the court below committed no error.

We are of the opinion that the lessee, Gross, by continuing in possession of the premises and paying the stipulated rent,

without notifying the lessor of his intention not to make his election to renew, thereby bound himself for the term of four years from October 1, 1912. See *Foster et al v. Ellison*, 12 C.C. (N.S.), 399, where the court says on page 400, in speaking of the effect of holding over under a lease containing a provision for a renewal similar to the one under consideration:

“The term under the lease is for three and a half years, renewable forever, without any express notice required of the intention of lessee to renew. He held over the term of three and one-half years for a period of twenty days before notice to quit the premises [by the landlord] was served upon him, and thereby elected to renew.”

In 1 *Taylor on Landlord and Tenant* (9th Ed.), Section 332, at page 407, the author says:

“And where no notice is stipulated for, the tenant’s mere continuance in possession and paying rent, without express notice of his desire for the further term, entitles and binds him thereto.” Citing numerous cases.

In *Jones on Landlord and Tenant*, Section 338, the author discusses the question of whether or not a new lease is necessary under a privilege of renewal or whether at the option of the lessee it is extended by force of the covenant itself and becomes in effect a lease for the additional term. He states that there is a conflict of authorities on this point, New Hampshire, Massachusetts, Missouri and Maine holding that the election is exercised, where no notice is required, by the tenant remaining in possession and paying the rent. See *Ranlet v. Cook*, 44 N. H., 512; *Hall v. Spaulding*, 42 N. H., 259; *Ferguson v. Jackson*, 180 Mass., 557, and *Insurance & Law Building Co. v. National Bank*, 5 Mo. App., 333, affirmed 71 Mo., 58.

The author further states that there are authorities holding that the word “renew” and “extend” should be construed to mean that a new lease should be executed, citing *Kollock v. Scribner*, 98 Wis., 104, and *Orton v. Noonan*, 27 Wis., 272.

We think that the best considered authorities hold that a lease for a term with a privilege or option in the tenant of a renewal

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or extension for a further term upon the same terms and conditions is a present demise as to the renewal to begin at a future time, and under such leases no new lease need be required, but any indication on the part of the tenant of his intention to avail himself of his privilege operates to extend to him the right of the additional term.

It is true that some authorities make a distinction between a privilege of "renewal" and a privilege of "extension," but for all practical purposes, and to the mind of any ordinary person, a privilege of "renewal" and a privilege of "extension" vest in the lessee the same right, a right that adheres to the land and a covenant that runs with it.

The case of *Stevenson v. Alms*, 9 W. L. B., 17, is cited as an authority by counsel for plaintiff in error, to the effect that a tenant holding over under a lease similar to the one in the case at bar is not bound for the additional term. An examination of the facts in that case discloses that the tenant before the expiration of his term notified the lessor of his intention not to avail himself of his privilege and that he intended to vacate at the end of his term, and it was known to the lessor that the tenant had made arrangements to vacate and take other premises in the vicinity; so that it could not be held, as a matter of law, that by holding over in that case the lessee had impliedly elected to renew the lease.

In the case at bar the tenant, by continuing for three months in the premises, paying the rent under the lease and not notifying the lessor of his intention to surrender the premises and relinquish his privilege of a renewal, must be held to have thereby impliedly made his election to avail himself of his privilege of renewal, and to have thereby bound himself, and also the lessor, for the additional term. The rent not having been paid for the five months, and having accrued under the renewed term of the lease, the lessee became liable therefor, and the judgment was properly entered against him.

Judgment affirmed.

JONES (E. H.), J., and JONES (Oliver B.), J., concur.

IMPLIED CONTRACT FOR SERVICES AS HOUSEKEEPER.

Court of Appeals for Richland County.

SALISBURY V. FRANK, ADMINISTRATOR.

Decided, January 29, 1918.

Services—Family Relationship Not Created by Performance of Household Duties—Recovery on an Implied Contract—Master and Servant.

The fact that a woman lives in the home of a man and performs services for him does not create a family relationship, where the parties are not of blood kin and not related by intermarriage. Under such circumstances there may be a recovery for services rendered under an implied contract.

Van C. Cook, for plaintiff in error.

James P. Seward, contra.

POWELL, J.

The parties to this proceeding hold the same relative position in this court that they held in the court below; the plaintiff in error having been plaintiff and the defendant in error having been defendant in that court.

The action was commenced by the plaintiff, Lina Salisbury, to recover compensation for service rendered by her to one Louis Frank, deceased. She sets out in her petition two causes of action. The first is for service rendered as housekeeper for the said Louis Frank from November 1, 1913, to September 1, 1914, in the total sum of \$217. For her second cause of action she seeks to recover judgment for the value of services rendered by her as housekeeper and nurse for the said Louis Frank from September 1, 1914, to the time of his death, May 27, 1915, in the sum of \$577; making a total of \$794 in said two causes of action for which she asks judgment.

The answer does not deny the rendition of the service by plaintiff to the said Louis Frank, or the value claimed for them.

The defendant seeks to defeat a recovery upon the ground that

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the plaintiff became, and was at the time the said services were rendered, a member of the family of the said Louis Frank, and that by reason thereof she could not recover for services rendered except upon an express contract alleged and proved. There was no express contract alleged in the petition, but suit is brought upon an implied contract. There is no other defense set up. There is, however, a denial of indebtedness of the amount claimed. This is only a denial of a legal conclusion and does not amount to a defense to the cause or causes of action set out in the petition.

A reply was filed by plaintiff in the nature of a general denial, excepting that in her reply she admitted the payment to her of the sum of \$85 by the said Louis Frank in his lifetime, which should be credited on the amount sued for by her; but she denies each and every other allegation in the answer set forth.

Trial was had upon the issues thus made, resulting in a verdict of \$1 for the plaintiff. A motion for new trial was made and overruled, a bill of exceptions was taken embodying the entire testimony and the charge of the court, and the case was brought into this court by petition in error for review.

We have carefully examined the entire record, with all the exceptions and objections thereto taken and filed, and the authorities cited by counsel in their briefs.

Upon such examination we have arrived at the opinion that the testimony presented does not sustain the averments of the answer; and, further, that the relationship that existed between Louis Frank in his lifetime and the plaintiff was not a family relationship. It was only the ordinary relationship of master and servant, or employer and employee.

The evidence shows that they were not of blood kin and were not related by intermarriage, so that if any family relationship existed it must have been by operation of law and have grown out of the fact that she lived with the defendant and performed services for him.

The court finds that the relationship that did exist was not a family relationship, and that such relationship as was shown is not a defense against the claim of plaintiff as set forth in her petition.

At the time plaintiff entered into his employment the said Louis Frank, deceased, was without any family relationship. His wife was dead, his two sons had abandoned his home, and he was the only occupant of his dwelling-house. Under these circumstances plaintiff entered his home and became his housekeeper. She occupied this position from November 1, 1913, to September 1, 1914, when by reason of illness and failing health said Louis Frank became in need of the services of a nurse, and these services were rendered for him by the plaintiff until his death May 27, 1915. If plaintiff occupied any other relationship toward said decedent than that of housekeeper and nurse, during the period mentioned, both the pleadings and the evidence fail to show it.

It is said that she was a member of his family, and therefore not entitled to compensation for services without an express contract. Any domestic or servant is a member of her employer's family in the same sense that plaintiff was a member of decedent's family.

Defendant attempted to show by the evidence that an immoral relationship existed between plaintiff and decedent.

This the court thinks should not have been permitted, as nothing of that kind is alleged or set forth in the pleadings, and, while it is the law that immoral considerations of the character claimed to exist are not such considerations as will sustain an action, a party in order to avail himself of such defense must allege and prove that they exist. This was not done and no such claim appears in the pleadings. The testimony shows that plaintiff's services were of the value alleged by her, and that only the ordinary value or price of such services in this community was sought to be recovered by her.

We think "the laborer is worthy of his hire" and that the amount returned by the jury was inadequate and the verdict should be reversed and set aside. Section 11576, General Code, Subsection 5.

The court is of the opinion that the court below erred in not sustaining the motion for a new trial, for the reasons set forth in said motion.

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The judgment of the court of common pleas will be reversed, and the cause remanded for a new trial and such other proceedings as are authorized by law.

SHIELDS, J., and HOUCK, J., concur.

LIMITATION OF INDEMNITY ON ACCOUNT OF AUTOMOBILE ACCIDENT.

Court of Appeals for Hamilton County.

WALTER L. KLEIN, H. GEORGE SICKLES AND JOSEPH D. KLEIN,
EXECUTORS OF THE ESTATE OF SAMUEL KLEIN, DECEASED, v.
THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIM-
ITED, OF LONDON, ENGLAND.*

Decided, February 4, 1918.

*Liability Insurance—Construction of Provision in Policy Covering
Accident in the Use of an Automobile.*

The limitation of liability on the part of the defendant insurance company, under the policy issued by it indemnifying the plaintiff holder against bodily injuries suffered by any person or persons by reason of the maintenance or use by him of a certain automobile, is limited to five thousand dollars.

Kramer & Bettman, for plaintiffs in error.

Worthington, Strong & Stettinius, contra.

BY THE COURT.

The policy upon which this action is based indemnifies plaintiffs "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered by any person or persons by means of the maintenance or use" of a certain automobile, within certain limits of time and place, subject to certain conditions among which is:

*Affirming *Klein et al v. Employers' Liability Co.*, 19 N.P.(N.S.), 426.

"Condition A. The corporation's liability on account of an accident resulting in such injuries to one person, including death, is limited to five thousand dollars (\$5,000), and subject to the same limit for each person; the corporation's total liability on account of any one accident resulting in injuries to more than one person, including death, is limited to ten thousand dollars (\$10,000)."

By reason of bodily injuries to Jennie Goldstein damages have been recovered and paid to her and also to her husband, Daniel Goldstein. It is conceded by defendant that it is bound to indemnify plaintiffs for both these recoveries, subject to the limitation expressed in the policy. The only question to be determined is whether the limit of liability is five thousand or ten thousand dollars.

We hold that this limit is five thousand dollars.

This is clearly fixed by the first clause of Condition A: "The corporation's liability on account of an accident resulting in such injuries to one person, including death, is limited to five thousand dollars." This clause by the use of the word "*such*" injuries refers only to *bodily* injuries, and limits the indemnity, no matter how many may recover because of such injury, since, as in this case, more than one person may claim and secure damages for bodily injuries to the one person.

The latter part of Condition A, which increases the limit where more than one person is injured as a result of any one accident, is distinctly stated to be "subject to the same limit for each person"—that is, to the five thousand dollar limit for each person receiving bodily injuries.

We are in accord with the opinion of Judge May in the trial court, as found in 19 N.P.(N.S.), 426.

Judgment affirmed.

JONES, P. J., and HAMILTON, J., concur; GORMAN, J., not participating.

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**NAKED SUSPICION NOT SUFFICIENT TO OVERTHROW
A WILL.**

Court of Appeals for Coshocton County.

S. F. CHANEY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF
ABSOLOM LYNCH, DECEASED, v. CLARENCE COULTER.*

Decided, May Term, 1918.

*Wills—Contest of—Scrivener May be Called for Cross-Examination,
When—Presumptions of Validity which Overcome Circumstances
to which Suspicion May Attach—Competency of Declarations Made
by Testator Before and After Execution of the Will—Instructions
to Jury with Reference to Prima Facie Evidence, Testamentary
Capacity, Undue Influence and Fraud—Degree of Proof Required
to Establish Fraud in a Will Case—Not Competent for Jurors in
a Will Case to Apply Their Own Experience in Life for Sworn
Testimony.*

1. In an action to contest a will the scrivener may be called for cross-examination, where he is the executor under the will and is made by the issues raised to appear as an adverse party.
2. The presumption that the will was drawn in accordance with instructions given by the testator is sufficient to overcome the objection that it is written on pieces of paper of different sizes and grade, where the explanation offered for so doing indicates that it was done innocently and not for any fraudulent purpose.
3. While testimony as to declarations made by the testator before and after execution of the will may be competent on the question of testamentary capacity, such is not the case on an issue of forgery, and the admission of such testimony in a case where that issue has been raised is not cured by the giving of a special charge to the effect that, if the jury find the will was executed on the date specified, it would not matter what the testator may have said on other occasions as to his intention and all such declarations with respect thereto should be disregarded, if the objectionable testimony was not withdrawn from the jury in a manner which could not have been misunderstood by them and no direction was given them not to consider it except as implied in said charge.

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, November 19, 1918.

4. Failure of the trial court in its charge to the jury to distinctly state and emphasize the effect of the order probating the will, or the statutory provision make such probate *prima facie* evidence of its attestation, execution or validity, constitutes prejudicial error.
5. It is also prejudicial error to refuse to charge that *prima facie* evidence of a fact is, as a matter of law, such evidence as in the judgment of the law is sufficient to establish the fact and if not rebutted remains sufficient for that purpose.
6. It is the duty of the trial court to specifically instruct the jury on the legal questions raised by the evidence, and in the contest of a will this requirement has particular reference to the definitions of testamentary capacity, fraud, undue influence, and the legal presumption arising from the absence of proof tending to sustain either, or the effect of fraud or undue influence practiced at the time of the making of the will.
7. While the rule requires in many cases that fraud be proved by clear and convincing testimony, a preponderance of the testimony is sufficient to sustain such an allegation in an action to set aside a will.
8. The instruction that the jury may be guided by their own experience in life, while proper in certain classes of cases, is out of place in a will contest where issues as to testamentary capacity, undue influence and fraud can be determined only by the sworn testimony of the witnesses offered.
9. The fact that the will which was admitted to probate differs in some respects from previous wills executed by the same decedent, affords no basis for an allegation of undue influence or forgery in its execution, where reasons appear for the changes which were made, and the same executor was named in all of the wills and he a man in whom the decedent had long reposed confidence in business affairs, and nothing is offered to impeach the integrity of the testamentary act and there is nothing but naked suspicion to overthrow it.

Wm. S. Merrell and J. B. Shepler, for plaintiff in error.

C. R. Bell, T. H. Wheeler and F. E. Pomerene, contra.

SHIELDS, J.

This action was brought in the court of common pleas of said Coshocton county to contest the validity of what purports to be the last will and testament of Absolom Lynch, deceased.

In the first cause of action in his petition the plaintiff, Clarence Coulter, alleged, in substance, that he is the only heir at law of the said Absolom Lynch, deceased, who at his death was

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the owner of an estate in said county consisting of real and personal property; that on the 18th day of April, 1917, a certain paper writing purporting to be the last will and testament of the said Absolom Lynch, dated November 10th, 1915, was presented for and admitted to probate by the probate court of said county; that letters testamentary were issued thereon by the said probate court to the defendant, S. F. Chaney, as executor, and that the other defendants are named as legatees and devisees of the said Absolom Lynch, deceased; "that said paper writing is not the last will and testament of the said Absolom Lynch, deceased, but was produced by the fraudulent and felonious act of the defendant, S. F. Chaney, who was the writer thereof, and the same does not speak the will and intent of the said Absolom Lynch, deceased; that the signature of the said Absolom Lynch to said paper writing was produced and appended thereto by means of fraud and circumvention, and its contents were never authorized or made known to the said Absolom Lynch nor acknowledged by him; that said paper writing and the devises and bequests therein provided were procured and made by the practice of fraud and undue influence and by means of false and fraudulent representations and forgery, and "because of the premises said paper writing does not speak the purpose or wish of said decedent." Wherefore the plaintiff prays that an issue be made up in respect to said paper writing, that the same be set aside and declared to be not the last will and testament of the said Absolom Lynch, deceased.

In the second cause of action the plaintiff alleges that the defendant, S. F. Chaney, claiming to act as executor under the provisions of said alleged last will and testament of the said Absolom Lynch, deceased, and in pursuance of the terms thereof, commenced an action in said probate court to sell the real estate of said decedent, and threatens to dispose of the personal estate of said decedent, in violation of the property rights of the plaintiff in said estate, and an order of court was sought and granted restraining the probate judge of said county from issuing an order authorizing a sale of said property, and against the said S. F. Chaney from making said sale, as executor, pending the determination of this action.

Issues of fact were joined by separate answers filed by the several defendants, including the guardian *ad litem* for the minor defendants therein named, denying all the allegations in the first cause of action in the plaintiff's petition, except that on March 17, 1917, the said Absolom Lynch died leaving the plaintiff as his only heir; that at the time of his decease he was the owner of an estate in real and personal property in said county; that on April 18, 1917, a paper writing purporting to be the last will and testament of the said Absolom Lynch, dated November 10, 1915, was presented to and admitted to probate by the probate court of said county; that letters testamentary were issued thereon by said probate court to the defendant, S. F. Chaney, as executor, who is now acting as such; that by the terms of said will the plaintiff and the defendants, except the defendant, Milo C. Ely as probate judge and S. F. Chaney as executor, are named as legatees and devisees of the said Absolom Lynch, deceased.

Answering the second cause of action in said petition said defendants deny all the allegations therein except that as executor under and by virtue of the last will and testament of the said Absolom Lynch, deceased, the defendant, S. F. Chaney, commenced an action in the probate court of said Coshocton county to sell the real estate of said decedent, and that the defendant, Milo C. Ely, is the duly elected and acting probate judge of said county. With the exceptions noted, the defendants and each of them deny each and every allegation contained in said causes of action numbered 1 and 2 in the plaintiff's petition.

Although an issue was made by said pleadings, it was ordered by the court that it be ascertained by the verdict of a jury whether said paper writing was or was not the last will and testament of the said Absolom Lynch, deceased. The case having been submitted to a jury, it was found by its verdict that said paper writing purporting to be the last will and testament of the said Absolom Lynch, deceased, was not his last will and testament. A motion was filed to set aside said verdict and for a new trial for numerous grounds stated therein; also a motion for judgment *non obstante veredicto*, which said motions were

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overruled and a judgment was entered upon said verdict. Thereupon a bill of exceptions was taken containing the evidence in said trial, including the rulings of the trial court thereon, the written requests submitted before argument to be given in charge to the jury, including those refused and those given, and the charge of the court to the jury, and by a petition in error filed in this court the plaintiffs in error seek a reversal of said judgment.

It appears that the said Absolom Lynch, whose will is in controversy, for many years prior to his death lived upon and owned a valuable farm of about one hundred and seventy-five acres, in Coshocton county, and also owned at said time personal property which after his death was appraised at about \$5,500. He lived to be some eighty-two years of age and died March 17, 1917. His wife died in 1914. Two children were born of their marriage, a son and a daughter, the former, William Lynch, intermarried with Melissa Lynch, having died in 1908, without issue, and the daughter, intermarried with ——— Coulter, having died long prior to the death of the son William Lynch. Of this latter marriage one child was born, namely, Clarence Coulter, the plaintiff below, who is married and has two children, Walter and Benson Coulter, both young in years. It appears that the son William lived upon his father's farm until his death, after which, perhaps in 1909, Clarence Coulter moved upon said farm, occupying a separate dwelling thereon, and he and his grandfather operated the farm together from that time until the spring of 1915, when Clarence Coulter went to Detroit, Mich., but afterward returned to Coshocton, where he lived up to the time of said Absolom Lynch's death. Melissa Lynch, wife of the deceased son William Lynch, remained in the family of the said Absolom Lynch, after her said husband's death, and so continued after the death of the wife of the said Absolom Lynch as his housekeeper.

It also appears that the said Absolom Lynch made three wills, the first in 1904; the second in 1909, and the third November 10, 1915, all written by the defendant S. F. Chaney. It is said that these several wills were made because of the changed con-

dition in the said Absolom Lynch's family—the death of his son William followed by the death of his wife. By the terms of said first will, after providing for his son William and the said Absolom Lynch's wife, Clarence Coulter was to receive the sum of \$1,000. By the terms of the second will made some two years after the son William's death, in 1909 or 1910, the said Absolom Lynch bequeathed the sum of \$2,000 to Nancy E. Chaney, wife of the said S. F. Chaney and a sister of the deceased wife of the said Absolom Lynch, who it appears rendered certain services to her said deceased sister in the early part of the latter's early married life, and he also bequeathed in said second will to the defendants, Fern Chaney and Clay Chaney, sons of the said S. F. Chaney, the sum of \$500 each, to Melissa Lynch the sum of \$2,000, and to his wife a life interest in said farm together with his interest in the live stock thereon and the accruing interest on a certain fund to be created and mentioned therein, and at her death said farm was devised to Clarence Coulter, subject to the payment of said bequests. Some five years later, and on November 10, 1915, the wife of the said Absolom Lynch having died in the meantime, he made a third will in which he again made the same bequests as in the second will, namely, \$2,000 to Nancy E. Chaney and \$500 each to Clay and Fern Chaney, \$3,000 instead of \$2,000 to Melissa Lynch, \$500 each to Clarence Coulter's two children, and the residue of his estate was devised to Clarence Coulter, giving to his executor therein named, the said S. F. Chaney, who was also named as executor in the said second will, directions to sell said farm, out of the avails of which said bequests were to be paid. This third will was executed in the presence of two witnesses, and all the formalities required by law in its execution and acknowledgment were duly observed and complied with. It was kept in the custody of the said S. F. Chaney until April 18, 1917, when it was duly admitted to probate by the probate court of said Coshocton county, and on said day the said S. F. Chaney, named as executor therein, was duly appointed and qualified by said court as such executor, who on May 10, 1917, commenced an action in said court to sell the real estate of said decedent

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under the terms of said will, and who was enjoined from so doing for the reasons set out in said petition.

Absolom Lynch lived in Perry township, some miles distant from the village of West Carlyle in said county. He was an industrious and frugal farmer and, as stated, he lived to attain the ripe age of some eighty-two years. While there was naturally more or less weakening of his body and faculties because of his age, still it does not appear that the mental grasp of the said Absolom Lynch of matters touching his farm and other interests, including his family relations and relatives, was affected at the time of the making of his last will. During the lifetime of his wife, he and his wife frequently visited the said S. F. Chaney and his family, who in turn visited them. After the death of his wife, the said Absolom Lynch continued to call on the said S. F. Chaney whenever his business called him to said village.

S. F. Chaney, as stated, was a brother-in-law of the said Absolom Lynch. He is now and for over thirty years last past has been the postmaster at said village of West Carlyle, having said office in his store where he is now and has been actively engaged in business during said time, with the exception perhaps of a short time caused by the burning of his store. He is also a notary public and as such transacts more or less business in that community incident to said office. For many years prior to his death it appears that the said Absolom Lynch entrusted much of his business correspondence, including the writing of his several wills, to the said S. F. Chaney, and whenever at said village, up to the time of his death, the latter's store was made his headquarters.

For the purposes of this opinion, the foregoing statement sufficiently shows the changed family relation of the said Absolom Lynch from time to time, the several wills made by him, and his relations to the said S. F. Chaney who wrote said wills.

Numerous grounds of error are assigned in the petition in error why the verdict in this case should be set aside and the judgment rendered thereon should be reversed. The record is indeed a voluminous one, all of which together with the ably

prepared and well-arranged briefs of counsel we have not only read, but have endeavored to give to them careful and thoughtful consideration. Without here repeating such grounds of error, we will consider such grounds only as we deem material and necessary to a determination of the questions arising upon the record in the case.

It was contended that the trial court erred at the beginning of the trial below in permitting the plaintiff below to call for cross-examination S. F. Chaney, the party who wrote the will in question. Had the action been one for the construction of said will, or any portion of the same, testimony of the scrivener as to instructions given him by the testator at the time of the preparation or execution of the will would not have been competent, but such is not the only relation of the witness here. True he was the scrivener, but he is also a party, and although a party as executor, under the issue raised by the pleadings, he is made to appear in the attitude of an adverse party, and we are therefore of the opinion that said witness was subject to the provisions of Section 11497 of the General Code, and that the action of said court in this respect was not erroneous.

An examination of the record shows that a considerable portion of it consists of the testimony of several witnesses who testify to certain declarations made by the testator in his lifetime at various times as to what disposition he intended to make of his said farm, such declarations having been made, as said witnesses testified, both before and after the execution of said will. Objections were made to this class of testimony, and on the overruling of such objections, exceptions were preserved which form the main ground of error urged here.

It will be borne in mind that the action herein was not one to construe the will of the said Absolom Lynch, deceased, but to set it aside for the reasons stated in the petition. In the revision and codification of the statutes it is provided that:

“Sec. 10503. A person of full age, of sound mind and memory, and not under restraint, who has property, or an interest therein, may give and bequeath it by last will and testament lawfully executed.”

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"Sec. 10505. Except nuncupative wills, every last will and testament must be in writing, but maybe handwritten or trpe-written. Such will must be signed at the end by the party making it, or by some other person in his presence and by his express direction, and be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge it."

Here it appears in testimony that the said Absolom Lynch on November 10, 1915, who was then "of sound mind and memory and not under restraint," requested S. F. Chaney to prepare and write his will, and after writing it, and after the said Absolom Lynch read it over and expressed his satisfaction with the same, and after declaring it to be his last will and testament to George Magruder and J. W. Hoover, he thereupon signed the same in their presence, and the said Magruder and Hoover thereupon signed the same in the presence of each other, at his request, as witnesses thereto. It thus appears that all the formalities required by law in the execution of a will to clothe it with the characteristics of a will were complied with.

The different pieces of paper on which the will was written and attached to each other, and the difference in the size and quality of the paper on which the attestation clause was written, as well as the time it was written and attached to the other parts of the will, with reference to the time the body of the will was written, were made the subject of comment by counsel for the plaintiff below as being unusual, if not suspicious. At the time said witnesses to the will subscribed their signatures thereto the testimony is that they were told why the tablet paper was used, and the scrivener testified that the sheet on which the attestation clause appears was purposely left open and unattached to the body of the instrument to enable the testator after reading the will to make any alterations or additions thereto that he might desire. Ordinarily it is reasonable to suppose that one writing a will would use not only the same grade but the same size sheets of paper, but under the explanation given by the witness why it was not so done, when considered in connection with the testimony of the subscribing witnesses to the will, it would seem that it was innocently and not fraudulently done,

aided as it would be, in the absence of evidence to the contrary, by the presumption that the will was drawn in accordance with the instructions given by the testator. *Morris v. Osborne et al*, 27 O. C. A., 161.

The authorities are uniform in holding that there is no valid objection to the use of different sheets or tablets of paper upon which to write a will, when fastened or pasted together as to constitute one instrument. Rockel in his work on Probate Practice, Volume 1, Section 1036, says:

“A will is valid if written upon several pieces of paper. It is valid even if the testator's signature is on a piece of paper separate from the dispositive clauses of the will; and it is held that it is not necessary that these papers be fastened together if their sense connects them. But it must be shown from the several pieces of paper themselves that they constitute but one entirety.” Schouler on Wills, Volume 1, Section 284; Page on Wills, Section 161, and numerous cases cited by Rockel.

The petition charged that the attestation clause to said will was procured by undue influence and fraud. On the subject of testamentary capacity of the testator at the time he executed said will, the trial court instructed the jury “to find on this issue in favor of the defendants and that the said Absolom Lynch was of sound mind and memory,” so that this issue was eliminated from the case.

It is contended on behalf of the plaintiff in error that with the will executed in form and as described by the subscribing witnesses thereto, with no part of it ambiguous or uncertain in its terms, but intelligible and readily understood, the same having been admitted to probate and letters testamentary issued thereon, that the trial court erred in admitting the testimony of witnesses both before and after said will was executed. The solution of the question presented is rendered more or less difficult by reason of the fact that the condition of mind and memory of the testator was left in the case, and testimony in relation thereto was permitted to go to the jury off and on until the close of the case. It is apparent that the action of the trial court in so instructing the jury was fully warranted. So long as the question of a want of testamentary capacity of the testator to

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execute a will was made an issue in the case, so long were these declarations of the testator competent, either before, after, or at the time of the execution of the will, "as showing the former state of mind of the testator, his long settled purposes, his affections or dislike, and the execution and contents of former wills," etc. We are aware that the holdings of courts in different jurisdictions are not uniform on this question, but we think that the trend of the decisions by the Ohio courts sustains the holding here made. But while we think that such declarations are competent as tending to prove the state of mind of the testator, they are not competent to prove the fact of undue influence, which rule of law was laid down by the Court of Appeals of the Eighth District in the case of *Boepple v. Mellert et al*, reported in 24 C.C.(N.S.), 409-410.

"The law is, that declarations of the testatrix, made before or after the making of the will, if made near such time, are admissible to prove the state of the mind of the testatrix, but are not admissible to prove the fact of undue influence. If the declarations tend to prove both the fact of undue influence and the state of mind of the testatrix, then the court must admit the testimony and instruct the jury that it can consider the declarations only so far as they tend to prove the state of mind of the testatrix."

This is the rule also stated in *Jones' Commentaries on Evidence*, Volume 3, Section 483, wherein the author says:

"It is highly necessary to watch the line which marks the purpose for which declarations of the testator may be admitted. We have demonstrated that under ordinary circumstances they are not admissible at all where the will is clear; that in case of ambiguity they are admissible for explanatory purposes; that in cases where the mental condition of the testator is challenged, they are part of the *res gestae*, the making of the will. It now becomes necessary to emphasize that declarations of the character treated in the last section are admissible only for the purpose of proving the condition of the testator. They afford no substantive proof of fraud, duress or undue influence, and are admissible for no such purpose. There must be independent proof and evidence exclusive of such declarations. If the statements are mere recitals of facts, and there is no such independent proof of

undue influence, they are, of course, pure hearsay and inadmissible."

The same rule is also stated in *Alexander's Commentaries on Wills*, Volume 3, Section 608:

"Declarations of a testator made in connection with the execution of his will, when pertinent to the issue, are admissible as part of the *res gestae*. As proof of the fact, however, of undue influence, declarations not contemporaneous with the execution are inadmissible; they must be treated as hearsay."

Same rule laid down in *Page on Wills*, also in *Schouler on Wills*.

Many adjudicated cases are cited in the foregoing text books sustaining the rule therein stated, but which we do not deem it necessary to refer to.

It will be seen from the charge of the court given in the case before us that the distinction observed in the instructions given to the jury in the case of *Boepple v. Mellert et al*, heretofore referred to upon the subject of testamentary capacity and undue influence, was not observed, nor was the jury instructed upon the subject of undue influence in its application to the case before us, either as to its meaning or its effect, or the burden of proof, for which we think the trial court erred. We think it is but proper to say in this connection that the nature and importance of the case, giving rise as it did to a variety of distinct issues, required that the jury should have been specially and properly instructed as to the law pertaining to such issues beyond the mere reading of the pleadings.

Among other things, the petition charged that the will in question was procured by fraud, "and by means of false and fraudulent representations and forgery." Counsel for plaintiff in error argued that the declaration of the testator made before and after the time of the execution of said will, testified to by witnesses heretofore referred to, as bearing upon testamentary capacity and undue influence, were also incompetent as bearing upon the alleged forgery of said will, and that the trial court therefore committed error in admitting them for said purpose.

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Without here repeating the testimony of said witnesses and giving only the substance of it, said witnesses testified that on numerous occasions, before, after and near to the time of the execution of said will, the testator stated he desired that his grandchild, Clarence Coulter, should have and possess his farm after his death, and at the death of Clarence, the same should go to his two childdren; that he desired that said farm should not be sold; that he at different times refused to sell any part of it, etc.

An examination of the authorities shows that the courts are not in accord on the subject of admitting declarations of a testator made before or after the execution of his will, where forgery is the issue. The two leading cases cited by counsel in their briefs are *Throckmorton v. Holt*, 180 U. S., 552, and *State of New Jersey v. Ready*, 78 N. J. L., 599, the former holding that:

“Declarations, whether oral or written, made by a testator, either before or after the date of an alleged will, unless made near enough to the time of its execution to become part of the *res gestae*, are not admissible as evidence in favor of or against the validity of the will.”

And the latter holding that:

“Where the issue is whether a will was executed or whether a will was made to have a certain tenor or provision, the pre-existing testamentary design of the alleged testator is always relevant; and, to evidence the existence of that design, his antecedent statements are admissible, when not too remote to be material.”

Both cases involve forgery of a will, the latter being a criminal case. It is needless to remark that both are interesting and ably written opinions upon the subject treated of, written as they were by the distinguished jurists who for many years have graced the benches of their respective courts and have enriched and dignified the profession with their learning in their respective spheres of judicial duty.

We have no desire to review these opinions by contrasting the views therein expressed, except to add that the views in the case first cited seem to harmonize with the rule already stated in

Jones' Commentaries on Evidence and *Alexander's Commentaries on Wills*, rather than the case last cited. We refer more particularly to the principle of law heretofore referred to that something more should appear than the mere expression of a wish or future intention by the testator in casual conversations had with him, or in the language of the text-writers "there must be independent proof and evidence of such declarations" and unless so supported, they are to be regarded as hearsay. True exceptions to this rule might find favor in the admission of such declarations if made and they became part of the *res gestae*, but the testimony shows no such conditions exist in this case. As stated, they would be competent upon the question of testamentary capacity, and they might also be competent in a case where undue influence was charged, as where the testator was of weakened and impaired mind owing to old age or sickness, or accident, but here the mental faculties of the testator while advanced in years were shown to be unimpaired at the time of executing said will. Commenting upon this class of evidence, Mr. Justice Peckham in the case of *Throckmorton v. Holt* referred to on page 573 in his opinion in said case says:

"After much reflection upon the subject, we are inclined to the opinion that not only is the weight of authority with the cases which exclude the evidence both before and after the execution, but the principles upon which our law of evidence is founded necessitate that exclusion. The declarations are purely hearsay, being merely unsworn declarations, and when no part of the *res gestae* are not within any of the recognized exceptions admitting evidence of that kind. Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental condition, yet they are generally stated in cases where the mental capacity of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact."

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Again, in commenting upon the uncertainty and unreliability of this class of evidence, the said justice on page 578 in said opinion says:

“There is another reason why no exception should be made in favor of such evidence upon which to build a presumption or inference of forgery, and that is the inherent weakness and danger of the evidence itself. No inference is generally more uncertain or unreliable than that which is sought to be drawn upon the question of the genuineness of a will from the alleged condition of a testator’s mind towards relatives or others, as evidenced by his declarations. It is every day experience that declarations of that nature are to the last degree unreliable as a basis for an inference as to probable testamentary disposition of property. Those who thought by reason of such declarations that they would certainly be remembered in the will of the testator are so frequently disappointed, and that too in cases where there is not the remotest suspicion of forgery, that it would seem exceedingly unsafe to permit a jury to draw an inference based upon such evidence, relative to the genuine character of the instrument propounded as a will.”

And on page 579 said justice says:

“The motives underlying and causing the particular provisions of a will may be so various and so hidden from observation that it is in the highest degree unsafe to draw an inference of forgery based upon declarations as to testamentary intentions which are so subject to change and which declarations may or may not represent the true feelings of the testator or even his actual testamentary intention at the time when spoken. The result is very apt to be a breaking down of the safeguards provided by statute for the proof of the due execution of a will, and to provide in place of that proof evidence which is in itself of the most unsatisfactory nature, and from such evidence permit a jury to draw a still more uncertain inference of forgery.”

It is true as counsel for defendant in error say that the foregoing decision rendered by the United States Court was made by a divided court, but it is the opinion of the majority of the court, and such majority declares the law. It is to be noticed that the rules of law laid down in this decision find support in many adjudicated cases in other jurisdictions. The New Jersey case referred to while a well considered case, it will be no-

ticed that outside of a review of the case of *Throckmorton v. Holt*, and a reference or two to Massachusetts and New York cases, cases in New Jersey are for the most part cited in the opinion. However this may be, the fact is, as already stated, that there is a conflict of authorities on the admissibility of declarations of this character, especially those made after the execution of a will.

Without extending our remarks further upon this branch of the case, we think the better reasoning and the weight of authority is, in the absence of some independent proof being shown in connection with declarations of the character referred to, that they were incompetent and should have been excluded, not however upon the question of testamentary capacity, but upon the issue of forgery. In this connection it is but fair to state that the trial court did give to the jury in charge before argument the following request submitted by counsel for the defendants below:

"12. I charge you as a matter of law that if you find from the evidence that Absolom Lynch executed this will on the 10th day of November, 1915, it would not matter what he may have said at other times, either before or after said date, about his intentions and you should disregard all such declarations and your verdict should be for the defendants and that this is the last will and testament of Absolom Lynch."

While this request was given, still the testimony referred to was allowed to go to the jury and was not withdrawn, nor were the jury instructed not to consider the same except as implied from said request, for which we think the court erred to the prejudice of the plaintiffs in error.

Other errors are complained of in the admission of testimony on the trial below, but we do not deem them of sufficient importance to merit discussion, especially in view of the conclusions we have reached in the case.

Numerous exceptions were taken to the action of the court below in its general charge to the jury as given and in its refusal to charge as requested before argument, which are assigned as error. Requests Nos. 1, 3, 4, 5, 7, 8 and 10 were re-

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fused, Nos. 2, 6, 9, 11 and 12 were given. Nos. 1, 3 and 4 involved questions of fact which will be noticed hereafter.

Request No. 5 is as follows:

"5. I charge you as a matter of law that the order of probate introduced in this case is *prima facie* evidence of the due attestation, execution and validity of the will introduced in evidence in this case, and, unless you find by preponderance of the evidence that this *prima facie* case is overcome by the evidence of the plaintiff, your verdict should be for the defendants, and that said will is the last will and testament of Absalom Lynch."

"6. I charge you as a matter of law that the burden is upon the plaintiff to prove by preponderance of the evidence that the will introduced in evidence is not the last will and testament of said Absalom Lynch, and, in order to warrant the setting aside of the will, such evidence should not only outweigh the evidence adduced by the defendant, but also the presumption arising from the order admitting the will to probate, and, unless it does so outweigh such evidence and order, your verdict should be for the defendants, sustaining the will."

Section 12083 of the General Code provides:

"On the trial of such issue, the order of probate shall be *prima facie* evidence of the due attestation, execution, and validity of the will or codicil."

That the instruction in Request No. 5 contains a correct proposition of law under the foregoing section of the code is not open to question, but is the same instruction contained in Request No. 6, which was given? If it is, then the trial court did not err in failing to repeat said Request No. 5, for it is held that one instruction to the jury by the court upon a given subject, when properly given, is all that is required. Said Section 12083 was recently before the Supreme Court of this state and was construed by it in the case of *Hall v. Hall*, 78 O. S., 415, wherein it reversed the judgment of the circuit court—

"for the reason that the charge to the jury (in the court below) is misleading and erroneous in that it nowhere distinctly states nor sufficiently emphasizes that the order of probate of the will, by the probate court, raises a presumption that the will so probated is the valid last will and testament of Mercy A. Hall; that the court did not clearly explain to the jury the legal effect of the provision of the statute, 'that the order of probate shall be

prima facie evidence of the due attestation, execution and validity of the will or codicil;’ that the jury was not instructed as it should have been instructed, that before they would be entitled to return a verdict setting aside the will they must be able to find that the evidence adduced by the contestant, Charles F. G. Hall, outweighs both the evidence adduced by the defendant, Anne S. Hall, and the presumption arising from the order of the probate court admitting the will to probate as the valid last will and testament of Mercy A. Hall.”

In the instruction given in the case before us the court did charge clearly that the burden was upon the plaintiff to show by a preponderance of the evidence that the said will was not the will of said Absolom Lynch to warrant it being set aside, and that such evidence should not only outweigh the evidence adduced by the defendants below but also the presumption arising from the order admitting the will to probate, etc., but does it appear that the trial court distinctly stated and sufficiently emphasized the effect of the order of the probate of said will. or that said court clearly explained to the jury the legal provision of said statute? Interpreting the rule as laid down by the Supreme Court we think it did not, and in failing to so instruct the jury we think the court erred to the prejudice of the plaintiffs in error.

Requests Nos. 7 and 8 were considered and disposed of in a former part of this opinion.

Request No. 10 is as follows:

“I charge you as a matter of law that *prima facie* evidence of a fact is such evidence as, in the judgment of the law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for that purpose.”

This request was refused, and we think was improperly refused. Under Section 12083, General Code, the order of probate carried with it *prima facie* evidence of the validity of said will and such presumption continued until overcome by competent evidence. In *Gomien, Executor, v. Weidemer et al*, 27 O. C. A., 177-178, which was a will contest case, Judge Walters in announcing the opinion in said case, quoting from *Crane v. Morris*, 31 U. S., 598, says:

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"*Prima facie* evidence of a fact, says Mr. Justice Story, is such evidence as in the judgment of the law is sufficient to establish the fact, and if not rebutted, remains sufficient for that purpose.

"*Prima facie* evidence of a fact is such as establishes the fact, and unless rebutted or explained by the evidence becomes conclusive and is to be considered as if fully proved. *State v. Burlingame* (Mo.), 48 S. W., 72.

We think that said Request No. 10 should have been given and in refusing to give it the trial court committed prejudicial error.

Various exceptions were also taken to the general charge of the trial court to the jury, and, among other things, that the trial court erred in not fully instructing the jury as to the law to be applied under the different issues raised by the evidence in the case. As already stated, the record in the case is a voluminous one, and the evidence raised various legal questions on which it became the duty of the trial court to specially instruct the jury. This is noticeably true with reference to the definitions of testamentary capacity, undue influence and fraud, and the legal presumption arising in the absence of proof tending to sustain either, which was omitted, nor does it appear that the jury were instructed as to the effect of the alleged undue influence or fraud practiced at the time of making said will, because unless it resulted in producing the effect charged, such proof would be unavailing to invalidate said will for undue influence or fraud. The evidence offered upon the trial raised a multiplicity of questions arising out of such evidence, it is true, but such fact in no wise procured exemption from duty of the trial court to so charge the jury that the verdict of the jury should be responsive to the facts and the law. As held in the case of *Parmlee, Admr., v. Adolph*, 28 O. S., 10:

"A charge to the jury should be a plain, distinct, and unambiguous statement of the law as applicable to the case made before the jury by the proof, and not mere abstract legal rules."

We are therefore of the opinion that the exceptions to said charge in the respect mentioned are well taken.

Referring to said charge upon the question of fraud, the trial court charged the jury as follows:

"Fraud is never presumed, but must in all cases be clearly proved. Fraud alleged does not necessarily need to be proven by direct evidence. Like all other facts, it may be proven by circumstances alone, but must be clearly proven, so you will inquire into all the facts and circumstances surrounding the making of this will."

We are aware that it is not unusual to find courts laying down as a rule of law that "fraud must in all cases be clearly proved," but we can not subscribe to the correctness of such rule in the face of the established rule by the Supreme Court of this state to be found in decided cases from time to time. While it is recognized that different degrees of proof are required in certain civil cases, in a case, for instance where the reformation of a contract is sought upon the ground of mutual mistake, clear and satisfactory proof is required of the party seeking such reformation, or where a family relative renders services to another in the same family, and in the absence of an express contract seeks a recovery for such services, clear and convincing proof is required, or where a party seeks to engraft a trust upon an instrument in writing, clear and convincing proof is required, but in a case like the one before us, which is a civil action, is anything more than a preponderance of proof required to sustain the allegation of fraud?

In *Jones v. Greaves*, 26 O. S., page 2, it is held that:

"On the trial of a civil action wherein the claim or defense is based on an alleged fraud, the issue may be determined in accordance with the preponderance or weight of the evidence, where the facts constituted the alleged fraud do, or do not, amount to an indictable offense."

In *Lyon v. Fleahmann*, 34 O. S., 151, the judge announcing the opinion of the court in said case on page 156, cites with approval the case of *Decker v. Somerset Ins. Co.*, 66 Maine, 209, and says:

"It can never be improper to call the attention of the jury to the character of the issue, and to remind them that more evidence should be required to establish grave charges than to establish trifling or indifferent ones. Such an instruction does not vitiate the rule that in civil suits a preponderance of evi-

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dence is all that is required to maintain the affirmative of the issue; for, as already stated, to create a preponderance of evidence, it must be sufficient to overcome the opposing presumption as well as the opposing evidence."

In *Mason v. Moore et al*, 73 O. S., 275, which was a case involving the liability of bank directors for the publication of an alleged false statement of the bank's resources and liabilities, the rule is there stated to be that a preponderance of the evidence only is required in such case. Other adjudicated cases in this state might be cited announcing the same rule. While we are aware that a different rule in like cases is recognized in other jurisdictions, the same as the rule laid down by the court below in the case at bar, yet we are of the opinion that the rule which prevails in Ohio is, that a preponderance of the evidence only is required in such case, and entertaining this view, we hold that an instruction to the jury that a higher degree than a preponderance of proof was required, was prejudicially erroneous.

The court below also instructed the jury as follows:

"You are the sole judges of the credibility of the witnesses, and by your own experience in life you may determine what the proof is."

This instruction insofar as the jury are the sole judges of the credibility of witnesses is correct, but is the remaining part of said instruction correct? The trial court appears to have proceeded upon the assumption that the jury could substitute the result of their own experience in life in determining the proof.

It is scarcely necessary to say that the evidence in a case, and not the jury's experience in life, is the standard set by the law by which the rights of parties, under the law, are to be determined. True there may be cases where the common knowledge of the jury, in considering evidence, may be exercised, as, for instance, in determining the value of services in an action upon a *quantum meruit*, as was held in the case of *Hossler v. Trump*, 62 O. S., 139, and the same rule might apply in a case for damages to property where the solution of the matter under inquiry could be aided by the jury's own observation, experience and

knowledge, but we know of no rule of law that permits the substitution of the juror's experience in life for the sworn testimony of witnesses in a will case where the issues raised are determinable solely by the evidence under the law. Observation, experience and common knowledge, or either, find no place or application in such case, for the issues here are testamentary capacity, undue influence and fraud. The instruction given was clearly erroneous, and prejudicially so, calculated as it was to mislead the jury from confining their inquiry to the issues presented in the case.

As grounds for setting aside the verdict of the jury and the judgment of the court in this case it is alleged that "the verdict and judgment are contrary to the manifest weight of the evidence and law" and that "the verdict and judgment are not supported by any evidence." Although not unmindful of the salutary rule laid down in *Breese v. State*, 12 O. S., 146, that,

"A judgment will not be reversed because the verdict is contrary to the evidence, unless it is manifestly so, and that reviewing courts will always hesitate to do so where the doubts of its propriety arise out of a conflict in oral testimony,"

we are constrained to say that we fail to find anything in this entire record, either of anything said or done, that can be construed, in our judgment, as indicating in any possible form or degree, that any undue influence was sought to be, or in fact was, exerted upon the said Absolom Lynch either before or at the time of the execution of his said will. Nothing whatever appears in the record showing that the testator at any time or place ever mentioned a word to anyone, or that he was at any time or place ever spoken to, concerning the disposition of his property, outside of the casual remarks made in conversations had with his neighbors in which they testified that he desired his farm to go to his grandchild after his death as heretofore referred to. We think there is an entire absence of proof to sustain, or tending to sustain the charge of undue influence.

With the question of testamentary capacity eliminated, the only remaining question is the alleged fraud practiced in obtaining the signature of the said Absolom Lynch to the attesta-

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tion clause on the last sheet of said will. In the light of the history of the events transpiring immediately before and at the time of the execution of this will, as testified to by the scrivener and attesting witnesses to said will, is there anything appearing in the record to show that said will was not executed as claimed by them, and according to law? What circumstance or what declaration is shown by the record that tends to impeach the integrity of the testamentary act of the said Absolom Lynch on that day? True, the provisions of his will then made vary with the provisions of the will shown to have been made by him some years before that time in respect to his said farm, according to his declarations made to some of his neighbors before and after the execution of the will in question, as testified to by them, but according to the testimony of the witnesses, Dr. R. Edwards, John W. Lee, Bene Pigman and John Funk, he may have had occasion to change his mind and did so for reasons satisfactory to himself, all of which he had the right to do. In said will he seems to have carried out the same desire and intention expressed by him in his will made before that time by providing for his deceased wife's relatives, as well as to provide for those nearest to him in affection. He likewise named as his executor the person to whom he had given his confidence in business correspondence and whom he had successively named as his executor in each of the different wills executed by him. Is such fact to be construed as a suspicious circumstance? If it is, then it is time that men in the legal profession who consent to accept trusts created under wills drawn by them for other persons should take notice of their liability to be charged with questionable practices. It is sufficient to say that the imputation is as unfounded as it is unjust. S. F. Chaney is not a beneficiary under said will, nor was he such under either of the other two wills executed by the said Absolom Lynch, and with the legal presumption in favor of the validity of said will, with nothing appearing but mere naked suspicion to outweigh or overturn it, we can not persuade ourselves as a reviewing court to approve the verdict of a jury setting aside the deliberate and solemn act of a person exercising his inherent right under the law and disposing of his property as he sees fit, provided, of course, that

in the exercise of such right he was under no such constraint or moral coercion as to interfere with his free agency, nor are we ready or willing as a court to condone the accusation by a judgment that the scrivener of such a will, made under the circumstances here described, is a forger. Character is still to be valued as an asset in human life, and the philosophy and mandate of the law require that a person shall not be deprived of it without sufficient and just cause. Here the testimony shows that S. F. Chaney is now and for a period of some thirty years last past has been the trusted agent of the Government as its postmaster in said village, and that the subscribing witnesses to said will have been known and recognized as reputable citizens of said village during said period of time, and not a breath of suspicion is even whispered from the witness stand against their reputation or character for truth and general integrity. Can it be said that their sworn testimony is to be brushed aside and held for naught? Until the present system of administering justice in our courts shall be changed, we shall hesitate to believe it.

We do not join issue with counsel for the defendant in error in their contention that courts should be slow to disturb the verdict of a jury, and should not do so, unless it appears that such verdict is clearly and manifestly against the weight of the evidence. As already indicated in this opinion, we not only find the verdict in this case against the clear weight of the evidence, but that the allegations of the petition as to undue influence and fraud are wholly unsupported by the evidence, and we therefore hold that the motion submitted by the plaintiff in error at the close of all the evidence in the case should have been sustained by the trial court and the jury instructed to return a verdict sustaining said will, and that the motion of the plaintiff in error for a new trial should have been sustained, and in overruling said motions said court erred.

For the errors indicated, the judgment of the court of common pleas will be reversed and said cause will be remanded to said court for such other action as may be deemed proper.

POWELL, J., and HOUCK, J., concur.

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Carroll County.

OPTION TO RETURN STOCK PURCHASED.

Court of Appeals for Carroll County.

HARTMAN v. GORREL ET AL.

Decided, April 10, 1917.

What Constitutes Reasonable Time—When a Question for the Jury and When for the Court—Circumstances May Affect Length of Time Permissible—Stock Purchased Under Option to Return.

Where the purchaser of certain shares of stock had the option to return the stock after one year from the date of sale, such option may be exercised in a reasonable time after the expiration of the year. What is a reasonable time in such case is a question of fact, or of mixed law and fact, unless the admitted facts are such as to make it apparent that the time taken to exercise the option was an unreasonable time.

McDonald & Oglevie, for plaintiff in error.

I. H. Blythe, contra.

METCALFE, J.

The plaintiff in error here was plaintiff below. Several amended petitions were filed in the case, and the question here is raised by the demurrer to the sixth amended petition. The demurrer was sustained in the common pleas court.

The facts as alleged in the petition are, in substance, that in April, 1906, the plaintiff, Elmer W. Hartman, purchased from the defendants, J. W. Gorrel and W. I. Powell, ten shares of stock in the Eastern Ohio Coal & Coke Company for the price of \$1,000, and that at the time of purchase an agreement was made between Gorrel and Powell and the plaintiff, by the terms of which the plaintiff had the right after the expiration of one year from the date of purchase to surrender his stock to the defendants and upon such surrender they were to pay him back the \$1,000 paid therefor. Afterwards the stock of the Eastern Ohio Coal & Coke Co. was transferred to the J. W. Gorrel Coal Co. and stock in the latter company taken in its place. This

was done in pursuance of an agreement between the stockholders of both companies.

This allegation is material only as bearing upon the averment in the petition that within "several months" after this change in stock was made the plaintiff decided to exercise his option and thereupon tendered to the defendant Gorrel the stock which he had received, and demanded the return to himself of the \$1,000 which he had paid for it, and that afterwards, in December, 1913, he made a second demand for the return of the money he had paid and a second tender of the stock. Both were refused. It is averred, also, that the defendant Powell could not be served with summons in this case.

The agreement set out in the petition was signed only by the defendants, Gorrel and Powell.

It is urged that there is no consideration for the agreement on the part of the defendants to pay back to the plaintiff the amount paid for the stock, when the plaintiff tendered back to them the stock itself; that the sale of the stock was a completed contract, and that when the defendants agreed to pay back the amount paid them after the plaintiff had exercised his option to return the stock to them, such agreement was unilateral and imposed no reciprocal duty or obligation upon the plaintiff.

We do not think this position is tenable. When the plaintiff purchased the stock, and as part of the agreement of purchase, the defendants agreed to give the plaintiff an option to return the stock, and in the event that he did so to pay him back the amount paid therefor, the agreement was clearly mutual, and the transfer of the stock and payment of the money furnished a sufficient consideration. In *The Davis Laundry & Cleaning Co. v. Whitmore*, 92 Ohio St., 44, where the action was based upon a contract for the sale of 126 shares of stock at a certain price and 124 shares at another price, it is said:

"That, upon acceptance, the obligations became mutual, and the promise of one furnished a consideration for the promise of the other."

We think that is the case here.

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Was the option exercised within a reasonable time? It is urged that the demand made within "several months" after the expiration of the year from the date of the purchase, and the subsequent demand in December, 1913, were not made within a reasonable time and hence the defendants were justified in refusing to comply with the demand.

The exchange of the stock of the Eastern Ohio Coal & Coke Co. for the stock of the J. W. Gorrel Co. took place in July, 1908, so that it appears that no demand was made until the lapse of a year and a quarter, to which should be added "several months," which is exceedingly indefinite, but we find nothing in the petition, that is to say no allegation of fact, to show that this was an unreasonable time. The rule seems to be well settled that where no time is fixed by the terms of a contract, within which a demand to do a particular act must be made, time is not of the essence of the contract, and the demand must be made within a reasonable time. *Laundry Co. v. Whitmore, supra*; *Catlin v. Green*, 120 N. Y., 441, and *Bassenhorst v. Wilby*, 45 Ohio St., 333.

The latter action was upon an indorsement, and the question was whether or not the note had been presented to the indorser within a reasonable time. The third proposition of the syllabus reads:

"What is a reasonable time is generally a mixed question of law and fact. Where the facts are in dispute, it should be submitted to the jury for its determination under proper instructions from the court; but where the material facts are admitted, or not in dispute, it is a question for the court, and can not properly be submitted to the jury."

On the issue made by the petition in this case, whether or not the demand and tender were made within a reasonable time, the court is not able to say as a matter of law upon the facts stated that the time was unreasonable, and we think the question should be submitted to a jury.

If no change had taken place in the financial affairs of the company, and neither of the parties could be harmed by the delay, that is one thing. If, however, the plaintiff was simply

lying back an unreasonable time waiting to determine the outcome of his investment, and when he saw that the affairs of the company were changing, or had changed for the worse, then attempted to get out from under, that is quite another thing.

Judgment sustaining the demurrer reversed.

POLLOCK, J., and FARR, J., concur.

BROKER'S FEES FOR MAKING LOANS.

Court of Appeals for Cuyahoga County.

S. ULMER & SONS V. FRED E. BRUML.

Decided, October, 1918.

Commission—Payable to a Loan Broker—Where Loan is Secured—But is Not Taken by Party Making the Application.

Where application is made to a broker for a loan, and he finds one who has the money and is willing to loan it on the security offered, but the loan is not made because of a difference arising between the parties for whom it is being procured, the broker is not on that account to be deprived of compensation for the work done, but is entitled to the same commission which would have been payable to him had the offer of the money been accepted.

LAWRENCE, J.

Error to the municipal court of Cleveland.

The parties stand in the reverse order in which they stood in the court below; we will refer to them in the relation in which they stood in the trial court.

This action was brought in the municipal court of Cleveland by the plaintiff to recover from the defendant partnership compensation for effecting a loan of \$10,000 on real estate by virtue of a contract between him and the defendant, whereby plaintiff claims it was agreed that in the event of his procuring a person able, ready, and willing to make the said loan, the defendant would pay him for his service therein \$100.

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The trial below was to the court and resulted in a judgment in favor of the plaintiff, and error is now prosecuted here to reverse such judgment on the sole ground that it was given for defendant in error, when it ought to have been given for plaintiff in error.

The plaintiff is an attorney at law and the defendant is engaged in making loans on real estate.

The record discloses that in January of this year, the defendant had on hand applications for loans and through two persons, Reintal and Newman, it came in touch with a man named Weil, who had money he desired to loan on real estate; that a loan of \$10,000 on property located on Murray Hill was first submitted to him by defendant. Weil was satisfied to make this loan, but told defendant to go to his brother-in-law, the plaintiff Bruml, for the purpose of closing up the details thereof. For some reason or another this loan failed of consummation, as did also a loan on property on East 152d street. A loan was then submitted to Mr. Weil on property located on Payne avenue. He was satisfied with this loan and placed in the hands of plaintiff \$10,000 for that purpose. Up to this point there is no dispute between the parties. When this Payne avenue loan was about to be consummated, plaintiff asked defendant what share of the 2 per cent. commission, that being the percentage defendant usually charged for making loans, he was to receive. Plaintiff claims that defendant told him that he would divide the commission equally with him, while defendant claims he agreed to divide one per cent. of the commission between plaintiff and Reintal and Newman.

This loan was never consummated; Bruml was willing that the loan go through if paid one per cent.—\$100—and offered to turn over to defendant \$9,900. This the defendant refused to accept, and suit was thereupon commenced by Bruml to recover his share of the commission.

The defendant contends that because the loan was not made, plaintiff is not entitled to recover.

With this contention we can not agree. It is not denied that if Bruml had been paid the \$100 he claimed, the loan would

have been consummated, the whole contention being relative to what the contract between the parties was concerning the division of the commission. We think that where one is able, ready and willing to make a loan to another, and a dispute arises as to what the agreement between the parties was relative thereto, he is not thereby to be deprived of compensation for his services in procuring the loan.

The evidence is conflicting. However, in this state of the record, we are unable to find that the judgment is manifestly against the weight of the evidence as claimed by defendant.

The judgment will be affirmed.

GRANT, J., and DUNLAP, J., concur.

MOTOR VEHICLES IN COLLISION.

Court of Appeals for Hamilton County.

THE BRUNS BROTHERS GROCERY COMPANY V. ORVON G. BROWN.

Decided, November 12, 1917.

Negligence—Collision of Automobiles at Street Intersection—Accident Due to Effort to "Cut the Corner"—Not Error to Omit from Charge to Jury a Qualifying Phrase Which Was Without Application.

1. In charging a jury with reference to observance by chauffeurs of a traffic ordinance, omission of the qualifying phrase of the ordinance, that drivers would be required to observe the rules therein laid down "as far as practicable," is not prejudicial where the evidence has disclosed no reason for the failure of the defendant's driver to observe the strict letter of the ordinance.
2. Where both parties are charged with negligence and the evidence is conflicting, the judgment will not be disturbed unless it is clearly against the weight of the evidence.

J. L. Kohl, for plaintiff in error.

Gideon C. Wilson, contra.

JONES, P. J.

The plaintiff in error seeks in this case to secure a reversal of a judgment against it entered in the court of common pleas in

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favor of the defendant in error for damages arising from injury to the person and clothes of defendant in error by reason of a collision between the motor truck belonging to the plaintiff in error and the automobile touring car of the defendant in error.

The collision took place while plaintiff was driving north on the east side of Reading road at six o'clock P. M., October 1, 1914, and the motor truck of the defendant was being driven south on the west side of Reading road and was turned diagonally into Lexington avenue. Plaintiff contended that the motor truck undertook to make a short cut into the north side of Lexington avenue without warning and without lights, so that it was impossible for him to avoid the collision although he claims to have been traveling at a speed not to exceed ten miles per hour, and that he swerved to the left as soon as he saw that the truck was being run immediately in front of him.

Two claims of error are chiefly relied upon by plaintiff in error in argument: that the verdict is contrary to the weight of the evidence; and that the court erred in its charge to the jury.

The record shows the conflict of evidence usual in such cases. It is the distinct province of the jury to determine the facts in a case of this character, and to fix the blame, where each party as in this case is charged with negligence. The court can interfere with the verdict of the jury only in cases where it is not sustained by the weight of the evidence,

A careful consideration of the record fails to convince the court that this verdict is not sustained by the weight of the evidence, but on the contrary the jury seem to have been justified in their finding that the collision was caused by the fault of the defendant below and that the plaintiff was free from negligence.

The plaintiff in error contends that the court erred in using the following language in its charge to the jury:

"I should have said, gentlemen of the jury, in this charge, that in turning to the left, when turning to the left, as it was in this case, no turn shall be made until the opposite half of the lateral street is reached. So, therefore, gentlemen, under the law, the driver of the truck would be required to go below the half of Lexington avenue, before he turned into Lexington avenue."

This charge was based upon Section 680 of the traffic ordinance of the city of Cincinnati, which is in part as follows:

"Section 680. *Traffic Regulations. Right-of-way.* The right of way of vehicles using the streets of the city shall as far as practicable, be subject to the following regulations: * * * In turning corners, when to the right, vehicles shall be kept to the right; when to the left no turn shall be made until the opposite half of the lateral street is reached."

Plaintiff in error says that the charge as given omitted the qualification which the ordinance contains, which provides these regulations "as far as practicable."

The record shows that there was no dispute as to the fact that Reading road was sixty feet in width and that Lexington avenue into which the truck was being turned was fifty feet in width; that no traffic interfered; and that there could be no finding by the jury as a matter of fact, nor was evidence offered to show, that it was not entirely practicable in this case for the driver of the truck to have observed the strict letter of the ordinance and avoided turning until he had reached the middle of Lexington avenue, but that he failed to do so.

While this paragraph of the charge might have been more accurately stated, it is not drawn so that it required any particular finding by the jury, and, taken in connection with the entire charge we do not think that it can be considered as error prejudicial to the rights of the defendant below.

Objection is also made as to the amount of the recovery. But in this respect the verdict seems to be sustained by the evidence.

A full consideration of the entire record fails to establish any reversible error to the prejudice of plaintiff in error.

Judgment is therefore affirmed.

FORMAN, J., and HAMILTON, J., concur.

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**TAXATION OF GOODS IN POSSESSION OF A
WAREHOUSEMAN.**

Court of Appeals for Hamilton County.

**FRED PAGELS V. EDMUND S. BEAMAN, AUDITOR, AND CHARLES
COOPER, TREASURER, OF HAMILTON COUNTY.**

Decided, November 29, 1918.

Taxation—Warehouseman Not Liable Personally for Taxes on Property in His Custody—Such Words as "Official Custodian," "Agent," etc., as Used in the Statute—Can Not be Broadened to Include Warehouseman—Nor can Such Property be Taxed on Merely Equitable Considerations—But May be Listed by the County Auditor—If Statutory Provisions are Closely Followed.

The entering upon the tax duplicate of goods and chattel property belonging respectively to many different owners in severalty in the custody and possession of a warehouseman, for storage purposes only, and the charging of the gross valuation thereof against him individually as a single item, does not comply with the provisions of the statutes with reference to the listing of such property for taxation and may be enjoined.

Dempsey & Nieberding, for plaintiff.

Joseph McGhee, Attorney-General, *Simeon M. Johnson*, Special Assistant, and *Campbell, Locke, Hauck & Capelle*, contra.

JONES, P. J.

This case was heard on appeal from the court of insolvency.

There is little if any dispute between the parties as to the facts. The action was originally brought by Fred Pagels, who has since deceased and is now represented by his administrator, against the county auditor and treasurer for a perpetual injunction against a tax charge placed by the county auditor upon the tax duplicate of Hamilton county, for the year 1917, against the name of Fred Pagels for personal property in the amount of \$217,500.

On April 8, 1917, Fred Pagels was engaged in Cincinnati in the business of warehouseman, being the owner of two warehouses in the sixteenth ward of said city which were conducted by him exclusively as warehouses for the purpose of receiving and keeping in storage furniture, household goods, pianos and automobiles under contracts made by him with the owners and possessors of such articles.

On the said 8th day of April, 1917, which was the day for making tax returns of personal property in said county, there were stored in said warehouses a number of pianos, automobiles and crates, packages and lots of furniture and household goods which had been left with plaintiff for storage purposes only by the various owners, possessors and custodians of said property. None of said property was then in the possession or control of plaintiff in his own right or in any right except as warehouseman and solely for storage purposes.

On or about May 22, 1917, the county auditor served a written notice upon plaintiff requesting him to furnish that office with the names and addresses of all persons, firms or corporations who had chattels of any kind stored with him during the year ending April 8, 1917, with a complete list of all goods and chattels so stored and their actual or insured values, and requesting him to bring to the auditor's office all records, books and data of every description which would furnish the required information.

Plaintiff declined in writing to furnish such names and addresses and such list of goods and chattels with the actual or insured value thereof, and declined to bring his books to the office of the said county auditor.

Thereupon the auditor proceeded under Sections 5401, 5402 and 5403 of the General Code to file an application in the probate court to require said Pagels and his two sons as agents to give testimony before said probate court relative to such personal property in their possession and control, which he claimed they were required to list for taxation.

Proceedings were thereupon taken in the probate court resulting in the refusal of Rheinhardt W. Pagels, who testified

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therein, and of plaintiff Fred Pagels to furnish the information desired. Said witnesses were not committed for contempt, and further hearing of said cause was continued by the probate court.

Thereafter on June 11, 1917, the county auditor sent a written notice to the plaintiff stating that he had listed in his name for taxation the following named items amounting in tax value to \$217,500:

100 Pianos at \$75	\$ 7,500
150 Autos at \$1,000	150,000
500 Sets of Furniture at \$100	50,000
Miscellaneous Paintings, Chinaware, Glassware	10,000

and stating that said listings were made based upon the hearing in the probate court.

Thereupon the county auditor listed upon the tax duplicate a single item of personal property in the name of Fred Pagels, 977 West Eighth street, at a gross value of \$217,500, and charged upon said duplicate the tax collectable one-half in December, 1917, and one-half in June, 1918, at the regular rates of taxation upon said valuation.

Plaintiff filed his petition in this case charging that said action of the county auditor was without authority of law and was an abuse and usurpation of his powers, was unauthorized, illegal and wholly void, and praying for a permanent injunction against the collection of any tax thereunder.

The defendants by answer admit the making of such charge upon the duplicate and insist that it was a valid and legal charge against plaintiff under proper authority of said auditor. And by way of a second and third defense defendants allege that the valuation as fixed by the county auditor was conclusive and, in the absence of fraud or gross mistake, can not be disturbed by the court, and that the plaintiff did not exhaust his remedies under the statute by complaint to the board of revision and to the state tax commission.

The first question raised is as to the jurisdiction of the court. The action is brought by virtue of Sections 12075 and 1637 of

the General Code. The question is not one of valuation, but is whether or not under the statutes the plaintiff is liable to be taxed at all for this property, and if so whether the auditor proceeded in the proper way to make this charge against plaintiff upon the tax duplicate.

The power of the courts to consider this question without the necessity of proceeding before the board of revision or the tax commission is clearly sustained by the case of *Hagerty v. Huddleston*, 60 O. S., 149, in which at pages 165 and 166 the doctrine is clearly stated:

"The valuation placed upon property by a taxing officer or board within the scope of authority conferred by law, when made in good faith, will be held and regarded by courts as conclusive of the value, unless it should appear that there was some gross mistake to the prejudice of the tax-payer. But when the complaint is not as to the valuation, but goes to the extent of claiming that under the statute the taxpayer is not liable to be taxed at all, under the peculiar circumstances of the case, that is that the tax is illegal, then the determination of the taxing officers and boards is only *prima facie*, and under Section 5848 (12075, G. C.), Revised Statutes, full jurisdiction is conferred upon the courts of common pleas and superior courts to enjoin such tax as illegal. * * * When the power to tax in any particular case is challenged, the citizen has the right to be heard in court as to the legality of the tax, but when the power to tax is conceded, and the complaint is only as to the valuation, a valuation made in good faith and according to the best judgment of the taxing officer, will not be disturbed by the courts in the absence of gross mistake."

The tax laws of Ohio have undergone so many changes especially during the last few years and are found in so many parts of the code—in many cases different sections practically duplicating the provisions of other sections—that it is very difficult to follow them and determine clearly what the effect of each provision may be. It is however in this case not necessary to go into these numerous provisions in detail or to refer to many of the sections.

There is no question under the Constitution or the statutes but that the property in storage should be listed at its true

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value in money as required by Article XII, Section 2 of the Constitution.

Under the statutory provisions it undoubtedly was the duty of the various owners of property stored in plaintiff's warehouses to make proper individual returns of their several properties and have the same listed for taxation in their own names; and so far as shown in this case that may have been done as to each and all of the various parcels of property covered by the valuation complained of. (G. C. 5366, 5370, 5371, 5372.)

Inasmuch as property of non-residents in this state or of persons under disabilities of various kinds, or for other reasons held by persons in various capacities for others, might except for special provisions escape taxation, it is proper for the state to provide that property so held should be returned by the party in possession for the benefit of others.

Section 5370, G. C., requires each person of full age and sound mind to list the personal property of which he is the owner, and makes provision for the listing of property of minors and others who may not be in possession.

Section 5371, G. C., provides where property shall be listed, and that a person required to list property on behalf of others "shall list it separately from his own, specifying in each case the name of the person, estate, company or corporation to whom it belongs."

Section 5372, G. C., provides that personal property "shall except as otherwise provided be listed in the name of the person who was or became the owner thereof on the day preceding the second Monday of April," etc.

Sections 5372-1, 5372-2 and 5372-3, are in their provisions somewhat analagous to Sections 5370 and 5371.

Undoubtedly, among other persons in possession of property so required to list same for taxation, the state might well have included warehousemen in possession of property, requiring them to list same and pay taxes thereon and giving to them a lien to secure such payment. *Judson on Taxation*, 2d Ed., Section 444; *Cooley on Taxation*, 653; *Carstairs v. Cochran*, 193 U. S., 10; *Thompson v. Commonwealth of Ky.*, 209 U. S., 340.

Laws have been sustained authorizing a tax on property in possession of one other than the owner against such possessor, and permitting the tax collector to proceed against the individual property of such possessor for the collection of such tax. *Hutchinson v. Board*, 66 Iowa, 35; *Commonwealth v. Gaines*, 80 Ky., 489; *Walton v. Westwood*, 73 Ill., 125; *City of Merrill v. Champagne Lumber Co.*, 75 Wis., 142; *Spanish River Lumber Co. v. Bay City*, 71 N. W. Rep. (Mich.), 595.

Some states have gone to the length of permitting chattel property in the possession of one other than the owner to be distrained or levied upon to satisfy taxes on the real estate of such possessor. *Sears v. Cottrel*, 5 Mich., 250; *Hersee v. Porter*, 100 N. Y., 403.

These cases are justified by the courts under the particular statutes which authorize such collection. We are, therefore, in every case required to consider the statutory authority for the listing and collection of the tax.

In the case at bar defendants justify the charge under the provisions of Sections 5372-1, which is as follows:

"Personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise in the possession or control of a person as parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney, or otherwise, on the day preceding the second Monday of April in any year, on account of any person or persons, company, firm, partnership, association or corporation, shall be listed by the person having possession or control thereof, and be entered upon the tax lists and duplicate in the name of such parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney or other person, adding to such name words briefly indicating the capacity in which such person has possession of or otherwise controls said property, and the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs; but the failure to indicate the capacity of the person in whose name such property is listed, or the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs shall not affect the validity of any assessment thereof."

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It will be observed that although many classes of persons are enumerated in this section, whose duty it is to list property in their possession or control, that a warehouseman is not specifically included and must therefore be brought under one of the other terms used. The auditor's return upon which his listing was based had endorsed upon it (not however at the proper place) the words "Agent, Custodian and Warehouseman," and defendants' counsel rely upon those words.

The statute, it will be observed, does not use the word "custodian" alone but the words "official custodian" doubtless referring to some public or corporate office by virtue of which possession or custody is held; so these words are not applicable to plaintiff in this case.

We are therefore limited to the word "agent," or else to the necessity of bringing into the statute the word "warehouseman" as one of the capacities intended to be included by the use of the word "otherwise" in the statute. It is somewhat questionable under the rule of construction known as "*ejusdem generis*," enunciated in 36 Cyc., 1119, whether the word "otherwise" is broad enough to include warehouseman and bring such capacity into the general class enumerated in the statute. This is more especially the case because of the provision of Section 5383, G. C., which provides that a consignee shall not be required to list "value of property consigned to him from another place for the sole purpose of being stored or forwarded * * * if he has no interest in such property. * * * In that section a consignee and commission merchant are treated together, but it will be observed that the storage feature of their business is somewhat analogous to that of a warehouseman. It is further suggested that while a lien is given to those paying taxes under various sections of the statute (G. C. 5683, 5687, 5689, 5693), and a lien is given warehousemen (G. C. 8483), for storage and numerous other charges and claims, "taxes" are nowhere specifically included.

It is strongly argued that the word "agent" is sufficiently broad to include a warehouseman. In 8 Adjudged Words and Phrases, 7392, we find the following definition:

“Warehousemen are of the class of bailees known as ‘paid agents’ exercising private employments whose liberty and relation is essentially different from that of common carriers.”

Then it is urged that the words “or otherwise” found in the statute must be given some meaning, and should be construed broadly enough to include a warehouseman, if not covered by the word “agent.”

In a matter so important as that of taxation the court will not by construction interpolate words into the statute to extend its terms; more especially so where an attempt has been made, as in the section under consideration, to enumerate all classes. But considering the intention and purpose of the Legislature and the ordinary acceptation of the language used, the court is of the opinion that the section in question should be construed to include one in such capacity as a warehouseman in the position of plaintiff, and where property in his possession has not otherwise been listed the auditor might under proper circumstances require its listing by him upon the tax duplicate, but in so doing the provisions of the statute must be clearly observed.

Nor do we regard such a construction of the law as imposing so unreasonable a duty upon agents, factors or attorneys—or warehousemen, if you please—as to make the law unconstitutional under the rulings in *State v. Boone*, 84 O. S., 346, and 85 O. S., 313. In that case statistical information of a nature entirely foreign to the professional duties of a doctor, pertaining to the ordinary field of census taker, were required in addition to the regular birth or death return which might have been properly required. The act there under consideration was held invalid as unwarranted and an unreasonable exercise of police power. No such objection could be made to a law requiring the return of personal property for taxation by one holding it in his possession.

Considering that it might have been the duty of Pagels to list property not otherwise listed, in storage in his warehouses, and upon his failure so to do that it be listed by the auditor, it must be listed, not in the name of the warehouseman personally,

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but under the provisions of Sections 5372-3 and 5371 it must be listed separately from his own property and there must be *specified in each case* the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs and the capacity in which the warehouseman holds it.

Section 5372-3, G. C., makes no provision for bulking up property held in storage by an agent, belonging as this property did to divers and sundry owners. An exception is made in this section as to pawnbrokers, showing that in such a business where the qualified title passes to the bailee such provision might be allowable.

To the argument that it would be inconvenient to separately list property, or that because of the contumacy of plaintiff the information was not given by him to the auditor as to the ownership of the different properties, it can be said that if the property were listed, as it should have been by its several owners, it would make as many items as if it were listed in the name of the warehouseman in his capacity as such, for the different owners; and Section 2583, G. C., provides for the listing of property in the name of an unknown owner. Then in that case if the tax were not paid the particular personal property subject to the unpaid tax could under Section 5671 be itself seized and held for its collection.

The law as it now stands can not be construed to permit a personal charge against a warehouseman to be made other than out of the goods against which the tax is charged and certainly not out of his private property or means, for a tax which should have been primarily paid by the owner of the property and for which he has been given by the statute no lien for reimbursement.

The argument that plaintiff should receive but scant consideration, because he has failed to assist the auditor in securing a full tax duplicate, is without merit. The statute provides punishment upon the failure to furnish proper information on the hearing before the probate court but no other provision penalizing him by tax charges against him personally is found in this statute.

It is further urged that this proceeding is equitable in its nature, and that no relief can be had by plaintiff unless he himself is without fault and comes into court with clean hands. While this action is equitable in its form it is purely statutory in its nature and gives a remedy to a tax-payer in addition to all other remedies formally provided. It is not necessary therefore to establish all of the elements of a case in equity. *Tone v. Columbus*, 39 O. S., 281, at 301-302; *Stephan v. Daniels*, 27 O. S., 526, 536; *Steese v. Oviatt*, 24 O. S., 248, 253.

As said by Williams, J., at page 496, in the case of *Markle v. Newton*, 64 O. S., 493:

A tax can not be "justified merely upon equitable considerations. Public burdens of that nature can be sustained only when authorized by positive law. And when such burden is illegally imposed, it is a statutory right of the party against whom it is charged, to stay its collection by injunction."

Doubtless the names of the several owners of the various items of property might have been ascertained by the proceedings in the probate court if such proceedings had not been discontinued. But if the property is listed under the sections of the statute which have been considered above, in the name of the warehouseman, it must be done not in his individual name but in his representative capacity, and separate listings must be made for the property of each owner, giving the name where ascertainable, and as the property of an unknown owner where such name can not be ascertained.

In the opinion of the court the charge as made on the tax duplicate against plaintiff does not comply with the law and is therefore illegal and void, and a perpetual injunction will be granted as prayed for in plaintiff's petition.

WILSON, J., and HAMILTON, J., concur.

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Licking County.

TITLE TO STREETS ACQUIRED BY ADVERSE POSSESSION.

Court of Appeals for Licking County.

**ETHEL PRATT SIMPSON ET AL V. THE INCORPORATED VILLAGE
OF JOHNSTOWN.***

Decided, March Term, 1918.

*Prescriptive Title—Acquired to Streets and Alleys—Claim of Abutting
Owners Based on Adverse Possession Good Against that of the
Public.*

Where an abutting owner on a platted street or alley takes possession of that part of the way upon which his premises front and includes it within the boundaries of his land and exercises all the rights and privileges incident to ownership for a period of more than twenty-one years, title ripens in him and an action lies restraining the municipality from interfering with his possession.

*Kibler & Kibler and Fitzgibbon, Montgomery & Black, for
plaintiff.*

Stasel & Cornell, contra.

HOUCK, J.

The plaintiffs bring this action against the incorporated village of Johnstown, in which they seek to restrain said village from taking possession of and opening up certain alleys and streets in said village.

The plaintiffs set forth in their petition that they are the owners of the alleys and streets in question by reason of the fact that they and their predecessors in title have had the open and uninterrupted possession of the same for more than *twenty-one years*. In the answer there is a general denial of all the material allegations in the petition, and further, as an affirmative defense, the answer says that by reason of certain plats filed by the original owner of said land prior to the year 1840, as well as by certain acts of the Legislature of Ohio, the

* Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 11, 1918.

title in and to said alleys and streets claimed by plaintiffs now vests in the state of Ohio, and therefore the statute of limitations, as claimed by plaintiffs, can not be invoked.

We have reviewed the evidence in this case with much care, and we are of the opinion that the claims made by the defendants are not borne out by the evidence in the case. On the other hand, we find from the evidence that the alleys and streets in question were never used by the public, and that for a period of more than sixty years they have been used and occupied, and fenced in, by those who were the holders of the paper title to said lots, and that in a number of instances buildings have been constructed upon the alleys and streets claimed by plaintiffs.

We further find the evidence to be clear and convincing that the plaintiffs, and their predecessors in title, for many years beyond the period of twenty-one years, have been in the possession of said streets and alleys. We think the law in this state is well settled that the occupation by abutting owners of a street, by taking possession of the whole, including it with the boundaries of their land, using it and occupying it as a part of their premises, cultivating and tilling the same, exercising all of the powers incident to ownership thereof, and selling and conveying the same to purchasers for valuable consideration, establishes adverse possession, and if such possession has been for a period of more than twenty-one years, it ripens into title. If this be the law, and if we apply it to the conceded facts in the case in hand, we are bound to find for the plaintiffs. Section 11220 of the General Code provides:

“If a street or alley, or any part thereof, laid out and shown on the recorded plat of a city or village, has not been opened to the public use and occupancy of the citizens thereof, or other persons, and has been enclosed with a fence by the owner or owners of the inlots, lots or outlots lying on, adjacent to or along such street or alley, or part thereof, and has remained in the open, uninterrupted use, adverse possession and occupancy of such owner or owners for the period of twenty-one years, and if such street, alley, inlot or outlot is a part of the tract of land so laid out by the original proprietor or proprietors, the public easement therein shall be extinguished and the right of such city or village, the citizens thereof, or other persons, and the

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council of such city or village and the legal authorities thereof, to use, control or occupy so much of such street or alley as has been fenced up, used, possessed and occupied, shall be barred, except to the owners of such inlots or outlots lying on, adjacent to or along such streets, or alleys who have occupied them in the manner aforesaid."

From an examination of this section of the statute, we are fully convinced that it is clearly applicable to the proven facts in the case at bar and is decisive of the case.

It therefore follows, from what we have already said, that the plaintiffs are entitled to the relief prayed for in their petition.

Decree and judgment accordingly.

POWELL, J., and SHIELDS, J., concur.

COMPENSATION FOR LEAD POISONING.

Court of Appeals for Jefferson County.

ROTH, ADMINISTRATRIX, v. THE INDUSTRIAL COMMISSION
OF OHIO.

Decided, December 15, 1916.

*Master and Servant—Lead Poisoning Not an Occupational Disease—
Where Contracted Outside of Regular Line of Duty—And Through
Negligence of Employer—Phrase "Personal Injuries Sustained in
the Course of Employment" Construed..*

R, a common laborer, not in the course of his ordinary occupation was, by the negligence of his employer, subjected to lead poisoning, from the effects of which he died, *held*:

1. That under the facts and circumstances of the case lead poisoning was not in his case an occupational disease.
2. The proximate cause of the injury and death of the plaintiff's intestate was the negligence of his employer in placing him in a position where he was subjected to the poisonous fumes of lead.
3. The injury received by the plaintiff's intestate is a personal injury within the meaning of the words, "personal injuries sustained in the course of employment," as used in the workmen's compensation law.

C. L. Williams, for plaintiff in error.

W. C. Brown, contra.

METCALFE, J.

The questions in this case are raised by the demurrer to the petition. The action is brought to recover compensation for the death of Edwin Roth, the claim having been presented to the state industrial commission, and rejected.

A demurrer was filed to the petition and sustained by the trial judge, and the plaintiff not desiring to further plead judgment was entered against her upon the demurrer.

The facts as stated in the petition are, in brief, that Edwin Roth was employed by McFeely Bros., of Steubenville, as a common laborer; that he had worked for them as such for a considerable period of time; that while in their employ as such common laborer he was directed by his superior servant, an employee of McFeely Bros., who had the right to so direct him, to do some painting; that it was a cold day and the paint would not flow from the brush, and thereupon he was directed by his superior servant to take the paint to a shanty a short distance from where he was at work, where there was a fire, and heat it so that it would run; that he did as directed; that there was no ventilation in the shanty and the windows were closed; and that after heating the paint he inhaled its fumes and thereby contracted lead poisoning from which he subsequently died.

It is also averred that he had no previous experience as a painter, and no knowledge whatever of the effects of heating the paint, or of inhaling the fumes therefrom, which would cause lead poisoning.

It is contended that the facts stated in the petition show that the plaintiff's intestate died of an occupational disease and not of a personal injury, that therefore the plaintiff would not be entitled to recover, and that the case is ruled by the case of *The Industrial Commission of Ohio et al v. Brown*, 92 Ohio St., 309, in which the Supreme Court recently held that the workmen's compensation law, as it now stands, does not apply to occupational diseases.

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Conceding that lead poisoning is an occupational disease to which painters are subject, and that in the case of one following the occupation of painting no recovery could be had under the workmen's compensation law for injuries sustained thereby, does it follow that one ignorant of painting and of the liability to lead poisoning, placed through the negligence of his employer in a position where he contracts the disease solely through the negligence of the employer, is prevented from recovering because such negligence caused him to contract an occupational disease? The majority of us are inclined to think not.

The facts set forth in the petition state a case of negligence on the part of this young man's employers. They were negligent in placing him in a position where he would inhale the fumes of the heated paint.

Can a liability be gotten rid of where negligence is the disease to which painters are subject? The proximate cause of the injury is the negligence of the employer. This young man was not a painter by occupation; he was a common laborer; was entirely ignorant of the effects of inhaling the fumes of heated paint; and was doing a work to which he was wholly unused. Temporarily engaging in painting at the direction of his superior officer does not make his occupation that of a painter. Can it be said that where a common laborer who knows nothing whatever of the effects of lead poisoning is placed by his employers in a position where, of necessity, he becomes exposed to lead poisoning, there can be no recovery because of the fact that he was injured by a disease to which painters are subject?

Suppose that he had been placed by his employers in a position where, by their negligence, he had contracted smallpox or some other contagious disease. Could there then be any doubt of his right to recover at common law, if he lived; or of his administrator to recover under the statute, if he died?

It seems to be inferred that a personal injury can only come through an act of violence: but this is not true. Has not one suffered "personal injury" when he is subjected to a disease which may injure him for life, or cause his death, just as much

as when he has broken a leg? We do not think that the term "personal injury" as used in the statute is applicable only to acts of violence, but that it may include any consequence to the person resulting from acts of negligence on the part of the employer; that is to say, where one is personally subjected to an injury, either by violence or disease, because of negligence, then the resulting harm is a personal injury.

We think this case is clearly distinguishable from *The Industrial Commission of Ohio et al v. Brown, supra*. In that case the party injured was employed in an occupation that is subject to lead poisoning. It was his regular occupation, and not a mere temporary incident while engaged in another occupation; which makes a wide difference in the two cases.

The judgment in this case is reversed.

SPENCE, J., concurs. POLLOCK, J., dissents.

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**CLASSIFICATION OF CITIZENS WITH REFERENCE TO EVILS
TO BE PREVENTED.**

Court of Appeals for Hamilton County.

THE STATE OF OHIO, EX REL CHARLES BALLI, v. GEORGE P.
CARREL, AUDITOR OF THE CITY OF CINCINNATI.

Decided, November, 1918.

*Constitutional Law—Validity of an Ordinance Forbidding the Grant-
ing to an Alien of a License to Operate a Pool Table for Hire.*

1. Local authorities may exercise a degree of discretion in the enactment of laws regulating, under the police power, the operation of such lines of business as affect the morals of the community.
2. The enactment of a municipal ordinance, which prohibits the granting to one who is not a citizen of the United States of a license to operate a billiard or pool table for hire, is not violative of rights conferred by the Fourteenth Amendment to the Federal Constitution, but is within the discretion of the municipal authorities.

George S. Hawke, for relator.

Saul Zielonka, City Solicitor, and *Dennis J. Ryan*, Assistant City Solicitor, contra.

HAMILTON, J.

The relator seeks by mandamus to compel the respondent to issue a license to him to operate a pool table in Cincinnati, Ohio, application for which was made by relator together with the tender of the license fee. The issue of the license was refused by respondent.

The answer of respondent claims to justify his refusal to issue the license upon the ground that relator is not a citizen of the United States, but is a citizen of the country of Greece, and that the ordinance of the city of Cincinnati prohibits the issuance of a license to keep a pool table to a person who is not a citizen of the United States.

The ordinance providing for the issuing of licenses under which application was made by relator, is as follows:

State, ex rel, v. Carrel, Auditor.

[29 O.C.A.]

"An Ordinance, No. 76—1918, 'Providing for the licensing of billiard and pool tables by amending original Section 777 of the Code of Ordinances of the city of Cincinnati.'

"Be it ordained by the council of the city of Cincinnati, state of Ohio:

"Section 1. That original Section 777 of the Code of Ordinances of the city of Cincinnati be and the same is hereby amended to read as follows:

"Section 777. Billiard Table, etc.—Each proprietor of a billiard or pool table shall pay a license of twenty-five (\$25) dollars per annum for one such table and fifteen (\$15) dollars per annum for each additional table; provided, however, that no license shall be granted to a person who is not a citizen of the United States.

"Section 2. That said original Section 777 of the Code of Ordinances be and the same is hereby repealed.

"Section 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

"Passed February 26th, A. D., 1918.

"Carl M. Jacobs, Vice Mayor.

"Attest: Fred Schneller, Clerk.

"Approved: John Galvin, Mayor. Feb. 28, 1918."

The relator admits that he is not a citizen of the United States, but urges that the provision of the ordinance "provided, however, that no license shall be granted to a person who is not a citizen of the United States," discriminates against him because he is an alien and is therefore unconstitutional under the Fourteenth Amendment of the Constitution of the United States.

Sections 3659 and 3670 of the General Code of Ohio empower municipalities to regulate and license pool and billiard tables, etc., and under the authority delegated to it by said sections the ordinance in question was passed by the council of the city of Cincinnati. The case is one, therefore, relating to the police power of the state, and is consequently a question concerning the peace and morals of the community. Does the ordinance transcend the police power conferred upon a municipality by the statutes and recognized by the law of the land?

In determining the question the same rules of construction will apply as are applicable in passing upon the constitutionality of an act of the General Assembly.

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It must be conceded that "private interests are frequently found in opposition to public good; that public morals, public health, public order, public peace and tranquility are objects of cardinal importance to the well being of society." To preserve and protect these objects for the public good many states, including our own state of Ohio, have passed laws limiting the granting of licenses to engage in the business of retailing intoxicating liquors to citizens of the United States. Such laws have been uniformly upheld, and in no instance held to be violative of the Fourteenth Amendment to the Constitution of the United States.

The leading case on this question is that of *Tragesser v. Gray*, 9 L.R.A. (Md.), 780, wherein it was held:

"Syl. 2. A state's denial to persons not citizens of the United States of the right to obtain licenses to sell spirituous liquors within its borders is not a discrimination against them or an abridgment of their rights within the prohibition of the Fourteenth Amendment of the Constitution of the United States."

And on page 786 the court says:

"We are unable to conceive that anyone, citizen or alien, can acquire rights which could in any way control, impair, impede, limit or diminish the police power of a state. Such power is original, inherent and exclusive; it has never been surrendered to the general government and never can be surrendered without imperiling the existence of civil society."

It seems clear that this case, together with like cases on the question of the sale of intoxicating liquors, is analogous to the one at bar on the question of regulation.

In the case of *Commonwealth v. Kinsley*, 113 Mass., 579, the court say:

"The keeping of a pool table for hire is one of the many things affecting the public morals which the Legislature can absolutely prohibit or can regulate,"

thus classifying pool tables for hire with the business of retailing intoxicating liquors as affecting public morals.

While it is true the element of the sale of intoxicants is not involved, it is a matter of common knowledge that pool and billiard tables are mostly frequented by young men many of whom are minors, with the opportunity ever present of forming habits detrimental to their future citizenship, and it is only fair and proper to presume that as a class citizens who are interested in the laws of our country may be better entrusted with the conduct of a business which directly affects social conditions, than an alien whose only interest is pecuniary.

The cases cited in the brief of counsel for relator are not in point, as in those cases the acts declared unconstitutional were clearly passed for the sole purpose of depriving the Chinese in the city of San Francisco of the right to earn a living in the laundry business. As the court say in the case of *Wright v. May*, 54 L.R.A. (Minn.), 153:

“A statute arbitrarily forbidding aliens to engage in ordinary kinds of business to earn their living would be unconstitutional. * * * But where the calling or occupation is one which, though lawful, is subject to abuse, and likely to become injurious to the community, there is good authority for holding that the state may limit it to its own citizens and deny the right to all others.”

In the case of *Commonwealth v. Hana*, 195 Mass., 262, the Supreme Court upheld the law of that state restricting the granting of peddlers' licenses to citizens and those who have declared their intention to become such.

In the case of *Patson v. Pennsylvania*, 232 U. S., 138, the cases of *Commonwealth v. Hana*. and *Tragresser v. Gray*, *supra*, were cited with approval in the United States Court.

In the case of *Patson v. Pennsylvania*, *supra*, the court upheld the statute of that state making it unlawful for unnaturalized foreign born residents to kill wild game except in defense of person or property. and to that end making the possession of shotguns and rifles unlawful, holding the law not unconstitutional under the due process and equal protection provisions of the Fourteenth Amendment. Mr. Justice Holmes after stating the right of the state to classify with reference to the evil to be prevented, said:

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“The question therefore narrows itself to whether this court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. * * * Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the State Legislature was wrong in its facts. * * * If we might trust popular speech in some states it was right; but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong.”

It will be seen from the above that the court had in mind the proposition that local authorities possessed discretion, to some extent at least, in the passing of laws under the police power regulating the operation of certain businesses as affecting the morals of a community, which discretion will not be interfered with by the court unless clearly shown to be an abuse thereof to the extent that it was manifestly wrong.

We are therefore of the opinion upon sound reason and the authorities cited, that the ordinance in question does not violate the Fourteenth Amendment to the Constitution of the United States, and the peremptory writ of mandamus is denied.

JONES, P. J., and WILSON, J., concur.

**RECOVERY FOR LOSSES DUE TO NEGLIGENCE OF
CORPORATE DIRECTORS.**

Court of Appeals for Stark County.

WASMER V. THE MASSILLON IRON & STEEL CO. ET AL.*

Decided, March 24, 1916.

Corporations—Action to Recover Losses—Due to Negligence of Directors—May be Maintained by Whom—Stockholders May Act, When.

1. The right to maintain an action for recovery of a loss resulting from the negligence of directors of a corporation is primarily in the corporation itself, either upon its own initiative, or on demand of a creditor, when a creditor is interested, or of a stockholder.
2. A secondary right to maintain the action accrues to a stockholder after demand made upon the corporation to institute such a suit and a failure on its part to comply with such demand or to prosecute the action in good faith to a final termination.
3. Such a suit can also be maintained originally by the stockholders, when the facts alleged and proved show that the suit would not be prosecuted in good faith for the benefit of the corporation and its shareholders.

Ammerman & Mills and J. Buchanan, for plaintiff in error.

Lynch, Day, Fimple & Lynch, J. Ralph Daugler, Jr., M. B. & H. H. Johnson and Henry, Fauver, McGraw & Thomsen, contra.

POWELL, J.

The judgment of the court of common pleas in this case is affirmed on the ground that the plaintiff, William J. Wasmer, is without any legal right to maintain the action.

If recovery can be had upon the facts stated in the petition, it would be a recovery not in favor of the plaintiff directly but in favor of the defendant, the Massillon Iron & Steel Company, for the benefit of its creditors and stockholders. Plaintiff's

*Motion to direct the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 6, 1916.

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interest in such recovery is as a stockholder of the Massillon Iron & Steel Company. The ground of recovery is the alleged negligence of the defendants as directors of said the Massillon Iron & Steel Company, whereby the loss of a large sum of money accrued to said defendant Iron & Steel Company and its stockholders. Such action can be maintained, and recovery had, in a proper case. Primarily the right to maintain it is in the corporation itself; either upon its own initiative, or on the demand of a creditor, when a creditor is interested, or of a stockholder. A secondary right to maintain the action accrues to a stockholder after demand made upon the corporation to institute such suit and a failure on its part to comply with such demand or to prosecute the action in good faith to a final termination. Such suit can also be maintained originally by the stockholder where the facts alleged and proved show that the suit would not be prosecuted in good faith for the benefit of the corporation and its shareholders. In the present case plaintiff, who was a shareholder, made demand upon the corporation to institute suit against its alleged delinquent directors to recover from them losses claimed to have been sustained by the corporation by reason of their negligence. This demand was made August 26, 1912, and suit was brought pursuant to such demand in October, 1912, which suit is still pending. This action was commenced December 3, 1912.

We hold that in such cases a suit brought in good faith, upon demand made by a stockholder, is in the nature of an election of remedies and that such stockholder is bound by it. Plaintiff's amended petition states several reasons why he should be allowed to maintain this action. These reasons if sufficient for that purpose would also have been sufficient to have allowed him to maintain an original action, without first making demand on the corporation. His remedy, if one were necessary by reason of bad faith or fraud in the prosecution of the original suit, was to have intervened in that suit by answer and cross-petition. By analogy to the doctrine of election of remedies, he is bound by his own act in making demand upon the corporation to bring

Judgment affirmed.

SHIELDS, J., and HOUCK, J., concur.

PROOF AS TO THE FIXING OF ALIMONY BY AGREEMENT.

Court of Appeals for Hamilton County.

FLORA MARKLEIN v. GEORGE MARKLEIN.

Decided, February 11, 1918.

Divorce and Alimony—Motion to Terminate Payments of Alimony—Competency of Evidence as to an Agreement with Reference to Payments.

At the hearing of a motion to terminate an allowance of alimony, it is error to refuse to permit the introduction of evidence tending to show that the allowance named in the decree was fixed by agreement and that said agreement was brought to the knowledge of the court at the time the decree was granted.

A. C. Fricke and Saul S. Klein, for plaintiff in error.
Owen N. Kinney, contra.

GORMAN, J.

This case is here on error from the court of insolvency.

It appears from the record that in 1911 George Marklein filed a petition in the court of insolvency for divorce against his wife, Flora Marklein, averring that she was guilty of gross neglect of duty in that she had willfully failed and neglected to take care of her home or perform her household duties. She was duly served with summons, and a return of such service was duly made.

On the 19th of February, 1912, the court of insolvency entered a decree in favor of the plaintiff, George Marklein, for divorce on the ground that the wife was guilty of gross neglect of duty towards the plaintiff. The wife had filed no answer, and was in default for answer.

The court further ordered that the plaintiff pay to the defendant, Flora Marklein, the sum of \$1,250 upon the endorsement of the decree, and further awarded to the defendant the sum of \$3 per week, as alimony, for her support, the plaintiff to pay the costs.

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It appears from the record that on February 17, 1912, two days before the decree was entered by the court of insolvency, Flora Marklein signed a paper which was thereafter filed in the court of insolvency on February 19, 1912, the day on which the decree for divorce and alimony was entered. This paper is a receipt to George Marklein, by Flora Marklein, for a municipal bond of \$1,000 issued by the city of Henderson, Kentucky, and also a check for \$250 drawn upon the Western German Bank, and two solitaire diamond rings. The paper further sets out the following statement:

"I also agree to accept the sum of three (\$3.00) dollars per week as alimony in the case of Marklein v. Marklein, and authorize the court of insolvency to so correct the decree made this day."

The plaintiff, George Marklein, continued to pay said alimony of \$3 per week until April 16, 1917, upon which date he filed a motion in the court of insolvency asking the court to terminate the payment of alimony.

Upon the hearing of this motion the wife was represented by counsel, who sought to show to the court that the amount of three dollars per week was by agreement of the wife and the husband at the time the divorce was granted in 1912.

The court refused to permit this evidence to be introduced, and refused to permit counsel for the wife to show that this agreement as to the payment of the sum of \$3 per week for alimony was brought to the attention of the court at the time the decree for divorce was granted. And the court upon final hearing made an entry in the case terminating the payment of the three dollars per week as alimony.

Error is prosecuted to this court on the failure of the court of insolvency to permit the evidence to be introduced to show that the amount of \$3 per week as alimony was by agreement between the husband and the wife and that this agreement was brought to the attention of the court on the 19th of February, 1912, the time of the granting of the divorce and alimony.

A motion was made for a new trial, which was overruled.

It is claimed in this court that the insolvency court erred, and that this error was fatal to the plea of the wife, and that the judgment below should be reversed.

We are of the opinion that the court below erred in refusing to permit counsel for Flora Marklein, plaintiff in error, to show that the amount of the alimony was agreed upon between herself and her husband. It would appear that there was no way in which the court would grant her \$3 per week as alimony because the defendant was in default for answer, unless it be by consent of the husband or by agreement between the parties. The record shows that the agreement consisting of a receipt by the wife, was signed two days before the decree was entered, and in this receipt it was set out, as we have above stated, that she agreed to accept \$3 per week as alimony to be paid to her by the plaintiff, her husband. This paper was signed two days before the decree was entered and it was filed in that court, and presumably must have been shown to the court before the decree was there entered.

Aside from the fact that such paper was filed in the court, we hold that it was proper for the wife to show that there was an agreement between herself and husband before the entering of the decree, and that this agreement was for \$3 per week to be paid by the husband; and further that this agreement was brought to the attention of the court even though there were no written agreement between them. The entry itself fails to set out that the amount of \$3 per week was by virtue of an agreement between the parties, but the admission of evidence to show that it was by virtue of agreement could have had no effect whatsoever in varying the terms of the agreement.

In the case of *Wood v. Jackson*, 8 Wendell (N. Y.) Rep., 2, the second paragraph of the syllabus is as follows:

“A former judgment may be given in evidence accompanied with such parol proof as is necessary to show the grounds upon which it proceeded, where such grounds from the form of the issue do not appear by the record itself, provided that the matters alleged to have been passed upon be such as might legitimately have been given in evidence under the issue joined, and such that when proved to have been given in evidence, it is manifest by

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the verdict and judgment that they must have been directly and necessarily in question and passed upon by the jury."

This principle being applied to the trial court would make such parol evidence admissible, because this evidence would not tend to vary the terms of the decree, either to contradict it, or to make the decree more or less, or in any way to affect the validity or force of the decree.

Counsel for the husband has cited the case of *Sargent v. Sargent*, 8 N. P., 238, as tending to support his contention that this evidence was incompetent, but an examination of the case cited shows that the court in the trial of the case did admit the oral evidence but subsequently was of the opinion that it ought not to have been admitted, although the court did admit the evidence tending to show the terms upon which the decree was entered.

In the case of *Olney v. Watts*, 43 O. S., 499, the court says that if the party complaining could have shown and proved that the amount of alimony was by virtue of an agreement, then it would be admissible.

We therefore hold that the court below in the trial of this cause should have permitted the oral evidence to be produced, as well as any written evidence tending to show that the amount of alimony to be paid to Flora Marklein by George Marklein was by virtue of an agreement to pay \$3 per week and that this agreement was brought home to the knowledge of the court at the time the court ordered the decree to be entered; and because of failure of the court below to admit this evidence the plaintiff in error was prejudiced, and the judgment is reversed and the cause remanded to the insolvency court for a new hearing.

JONES, P. J., and HAMILTON, J., concur.

APPLICATION OF THE THREE-FOURTHS JURY LAW.

Court of Appeals for Morgan County.

F. B. SMITH ET AL V. CARRIE E. CRAIG ET AL.

Decided, June 17, 1918.

*Roads—Appropriation of Land for—Compensation may be Assessed by
Nine Jurors—Section 11455.*

The three-fourths jury law applies to verdicts assessing the value of
land taken for a county road.

*G. O. McGonagle, C. H. Fouts and M. E. Danford, for
plaintiffs in error.*

John Q. Lyne and T. E. McElhiney, contra.

HOUCK, J.

Error to the Court of Common Pleas of Morgan County.

On December 4th, 1916, the plaintiffs here began a proceeding before the county commissioners of Morgan county, in which it was sought to have a county road established. The usual petition having been filed, and hearing had, the road was established by order of the county commissioners, and compensation and damages awarded certain land owners.

To the findings and orders of the county commissioners an appeal was taken to the probate court, trial by jury had, and a verdict returned against the establishment of the road. Only nine jurors concurred in the verdict. A motion for a new trial was overruled, and judgment entered accordingly. Error was prosecuted to the common pleas court, and the judgment of the probate court was affirmed.

But one question is raised by counsel for plaintiffs in error, namely: Was the verdict of the jury, which was signed and returned by nine of the twelve jurors, a valid, legal and constitutional verdict?

The claim of counsel for plaintiffs in error is: that under Section 19 of Article I of the Constitution of Ohio, the taking

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of private property for the making or repairing of roads must be compensated for to the owner in money, the amount to be fixed by a jury, which must be composed of twelve men, and all must agree in the verdict returned.

True, the basis of the suit under review was the appropriation of land for road purposes and the section provides, "and such compensation shall be assessed by a jury." But nowhere in the section and article of our Constitution relied upon by learned counsel does it fix the number of jurors necessary to concur in a verdict. Therefore, we must and are bound to look to some other constitutional or statutory provision to determine this question.

Section 5 of Article I of the Ohio Constitution, as amended September 3, 1912, reads:

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

Section 11455, General Code, reads:

"In all civil actions a jury shall render a verdict upon the concurrence of three-fourths or more of their number." * * *

Section 11212, General Code, reads:

"The provisions of law governing civil proceedings in the court of common pleas, so far as applicable, shall govern like proceedings in the probate court, when there is no provision on the subject in this title."

To us it seems clear that the makers of our Constitution and the members of our Legislature have clearly settled and determined the question involved in this case, and by so doing have saved the courts much trouble and labor. We think the constitutional and statutory provisions just referred to are clear and plain of meaning, and when applied to the facts in the case at bar only one conclusion can be reached, and that is that the judgment in this case, as entered by the probate and common pleas courts, is right.

Rupert v. Traction Co.

[29 O.C.A.]

Said constitutional amendment provided that, in civil cases, laws might be passed authorizing the rendering of a verdict by the concurrence of not less than three-fourths of the jurors. The action of the makers of our Constitution left it to legislative enactment, and that body has seen proper to act, and we must follow the Constitution and the law as we find same.

If we were to adopt the theory, as advanced by plaintiffs in error, we would find ourselves much confused in our endeavor to determine in just what cases the three-fourths rule would apply, and we think the view of counsel in this regard entirely too narrow.

Judgment affirmed.

POWELL, J., and SHIELDS, J., concur.

RIGHT OF A MINOR TO BE HEARD ON BECOMING OF AGE.

Court of Appeals for Hamilton County.

RAYMOND RUPERT V. THE CINCINNATI TRACTION COMPANY.

Decided, May 27, 1918.

Judgment Entered by Confession Before a Magistrate—For the Purpose of Effecting a Settlement in Favor of a Minor Who Claims He Was Not Represented—Right of the Minor to Prosecute Error Upon Becoming of Age.

Where a petition in error alleges that the plaintiff in error has become of full age since the rendition of judgment in a certain proceeding in which his name appeared as plaintiff but in which he was not legally represented or his rights properly protected by the appointment of a guardian *ad litem*, it is error to grant a motion to dismiss the error proceeding on the ground that the court is without jurisdiction.

McNeill & Thompson, for plaintiff in error.

Sherman T. McPherson, contra.

BY THE COURT.

This is a proceeding in error seeking the reversal of a judgment in the common pleas court, wherein that court sustained

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defendant's motion to dismiss plaintiff in error's petition in error and rendered a judgment therein dismissing said petition in error. This holding and judgment was based upon a finding that the court of common pleas had no jurisdiction to entertain or consider said petition in error in that court.

The action in the court of common pleas was a petition in error filed by the plaintiff in error in this proceeding against the defendant in error herein, seeking to review and set aside certain proceedings wherein a confessed judgment for thirty-five dollars was entered January 9, 1913, before a justice of the peace in an action brought by one Joseph Schillmoeller who alleged that he was "the guardian and next friend" of plaintiff, who was then a minor, against the defendant the Cincinnati Traction Company.

Said petition in error, in addition to the statement of the judgment and proceedings in said court sought to be reviewed, made certain allegations of fact which plaintiff in error deemed necessary in order to secure such review, among which were the allegations that he became twenty-one years old on the 7th day of May, 1916; that said Joseph Schillmoeller was a mere volunteer in bringing said suit as guardian and next friend and had no warrant or authority in that capacity; that he was not appointed by said justice of the peace as guardian or next friend to the plaintiff nor was he ever appointed by any court as guardian of plaintiff; that no trial of said cause was had before said justice of the peace nor was any testimony heard or any investigation made into the facts of the case, but that said judgment was entered to carry out an agreement of settlement theretofore made between said Joseph Schillmoeller and the Cincinnati Traction Company; and that said justice of the peace never acquired jurisdiction to hear and determine said cause.

It is held in *Roberts v. Roberts*, 61 O. S., 96, that it is proper to aver such extrinsic facts, in a petition in error, as may be necessary to show that plaintiff in error has succeeded to rights under the judgment or has reached the age of majority, and as to such extrinsic facts the petition in error should be verified, as was done in this case.

The petition in error in this case was filed June 19, 1916. It alleges that plaintiff in error became of age May 7, 1916. This is an allegation of fact upon which issue may be taken by defendant in error and, if found to be true, brings plaintiff within the terms of Section 12270, G. C., and entitles him to prosecute the proceedings in error. The fact that the record in the court of the justice of the peace may show a different age as to plaintiff in error, does not prevent him from averring his true age and establishing his right to bring error proceedings in the court of common pleas.

The court of common pleas clearly erred in holding that it was without jurisdiction to hear and consider the petition in error and in entering a judgment of dismissal.

How far plaintiff in error can go in proving facts contrary or in opposition to the record of the case below, and the effect of such record, is not at this time presented to the court. The purpose of the law is to afford a minor an opportunity to be heard, upon arriving at full age, in a case where he has not been, legally represented and where his rights have not been properly protected by the court by the appointment of a guardian *ad litem*, as provided by Section 10234, G. C., or otherwise as may be provided by law. Such issues of fact as are properly alleged in the petition in error must be heard and considered by the court of common pleas, if issue is taken thereon by the defendant in error. But as no hearing upon these issues was had in that court it would be premature for us to discuss and consider them.

The judgment of the court of common pleas must therefore be reversed and the cause remanded for further proceedings.

JONES, P. J., WILSON, J., and HAMILTON, J., all concur.

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**LIMITATION ON RECOVERY BY NEXT OF KIN FOR
WRONGFUL DEATH.**

Court of Appeals for Trumbull County.

**GERRARD, ADMINISTRATOR, v. THE MAHONING VALLEY
RAILWAY COMPANY.**

Decided, September 26, 1918.

*Liability for Wrongful Death—Parents and Next of Kin Without Right
of Action—Where Wife of Childless Couple Survives Husband—
Policy of the Law with Reference to Compensation for Wrongful
Death.*

When the death of a person is caused by the wrongful act of another, Sections 10770 and 10772, General Code, do not give a right of action for the benefit of the parents and his next of kin, if such person died without children, but leaving a wife surviving him, although the wife died without an action having been begun for her benefit.

*Harry C. Gahn, John J. Sullivan and Warren Thomas, for
plaintiff.*

*Fillius & Fillius and Harrington, DeFord, Heim & Osborne,
contra.*

POLLOCK, J.

The defendant, the Mahoning Valley Railway Company, was, on August 27, 1915, operating an electric street railway over the streets of the village of Gerard, and on that date plaintiff's intestate, Fred H. Gerrard, was riding on a motorcycle, attached to which was a side car in which his wife, Clara Gerrard, was riding. While Gerrard was driving his motorcycle along the streets of this village, it came into collision with one of the electric cars of the defendant company, causing the death of both himself and wife.

This action was brought by his administrator to recover damages from the defendant for the benefit of Gerrard's father, mother and brothers and sisters, claiming that the collision which resulted in his death was caused by its negligence.

There was an issue joined by the answer to the petition, denying plaintiff's right to recover for the beneficiaries named in the petition and the negligence alleged therein.

Afterwards, the case went to trial, and at the close of the plaintiff's testimony, defendant, by motion, asked the court to direct a verdict on the ground that the persons for whose benefit the action was brought had no interest in a recovery. The court sustained the motion and this action is prosecuted to reverse the judgment of the court below for error in sustaining that motion.

It developed in the testimony that Fred Gerrard, at the time of his death, had no children, and that his wife, who was injured in the accident, lived some hours after his death, but died without any action having been brought for her benefit to recover damages for negligently causing her husband's death. Before the bringing of this action Mrs. Gerrard had died, and it was brought for the benefit of his father and mother and brothers and sisters, as before stated.

The right to maintain an action to recover damages from another for his wrongful act which causes death is given by Section 10770 of the General Code. Section 10772 of the General Code, designates the persons for whom such action may be maintained, and reads, so far as necessary in this case, as follows:

Section 10772. "Such actions shall be for the exclusive benefit of the wife, or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death was so caused. It must be brought in the name of the personal representative of the deceased person and the jury may give such damages as it may think proportioned to the pecuniary injury resulting from such death, to the persons, respectively, for whose benefit the action was brought."

The Legislature, by this section, separated the persons for whom a recovery could be had into two classes. First, the recovery is for the benefit of the wife or husband and children; then, second, if there be neither of them, then for the parents and next of kin of the deceased. The cause of action accrues at

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the death of the person injured by the negligence of another, and the rights of the beneficiaries are fixed and determined at that time. At the time of the death of Gerrard, his wife was the sole beneficiary under this statute. His parents and brothers and sisters had no pecuniary interest in the damages that might be recovered for his wrongful death. Their interest at the death of Fred Gerrard could not arise, when at the time of his death, his wife was living. It is only by reason of her death that they can claim any interest in a recovery for his wrongful death. Change of beneficiaries by death after the decease of Fred Gerrard could not change a liability that had already vested.

In *Doyle, Administrator, v. Baltimore & Ohio Railroad Company*, 81 Ohio State, 184, the plaintiff administrator brought suit against the defendant to recover damages for the wrongful death of her husband, alleging that he left no children and that she was the sole beneficiary. The case was tried in the court of common pleas, and a judgment recovered. Error was then prosecuted to the circuit court and there the judgment of the common pleas court was reversed, and from that judgment error was prosecuted to the Supreme Court where the judgment of the circuit court was affirmed. While the proceedings were pending in the Supreme Court, the wife died. An administrator *de bonis non* was appointed, and the action revived in his name. The action was remanded to the common pleas court and there amended pleadings were filed which developed the fact that the wife, Mary Doyle, at the death of her husband, was his sole heir and next of kin, that he left no children or parents, that he had some collateral heirs, and that the mother of said widow survived her. The court held that according to the provisions of Section 6135, Revised Statutes (now Section 10772, G. C.) after the death of said widow there remained no statutory beneficiary—

“Unfortunately there is no provision of the statute, that upon the death of Mary Doyle, the exclusive beneficiary in the suit, the right of action shall vest in some other next of kin of John Doyle, who at the time the cause of action herein accrued, had no interest in it.”

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“Unfortunately there is no provision of the statute, that upon the death of Mary Doyle, the exclusive beneficiary in the suit, the right of action shall vest in some other next of kin of John Doyle, who at the time the cause of action herein accrued, had no interest in it.”

It will be noticed that the difference between the case just referred to, and the case now before us, is that on the death of the husband in the former case there was no person left who could be a beneficiary under the statute except his wife. While in the instant case, at the time of the husband's death, his wife survived him and he had parents and brothers and sisters; but under the provisions of the statute, none of these at that time could receive any benefit from his wrongful death except his wife.

This case does not dispose of the question we have here, but it is helpful in determining the limitations that should be placed upon this statute. Price, Judge, in the opinion on page 191, referring to the section, says:

That it "provides that where there is no wife or husband, and no children, the action shall be for the benefit (exclusive) of 'the parents and next of kin of the person whose death shall be so caused.' In this case, there was a widow but no children, so that the clause relating to the right of 'parents and next of kin' of the deceased husband has had no field for operation."

And again on the following page he says:

"Unfortunately there is no provision of the statute, that upon the death of Mary Doyle, the exclusive beneficiary in the suit, the right of action shall vest in some other next of kin of John Doyle, who at the time the cause of action herein accrued, had no interest in it."

To now hold that the action could be maintained for the benefit of the parents and brothers and sisters would be giving them a right to recover for damages in which they had no interest, and which did not accrue at the time of Gerrard's death, but their only interest therein came after and by reason of the death of the wife.

The Supreme Court of Maine, in the case of *Hammond v. Lewiston Railway Company*, 76 Atlantic, 672, under a statute, so far as the beneficiaries are concerned, somewhat similar to our own, held that the cause of action vested immediately and

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finally at the death in the statutory beneficiary, and not when suit was brought; and, hence, on the death of the beneficiary could not be transferred to any other beneficiary on her failure to sue.

To the same effect is: *Woodward, Administrator, v. Chicago & Northwestern Railway Company*, 23 Wis., 400; *Dillier v. Railway Company*, 35 Indiana Appeal, 52 (72 Northeastern, 271); *Longul v. Mansfield*, 91 Tenn., 458; 19 Southwestern, 53.

Our attention has been called to the rule announced by our Supreme Court that—

“In applying these statutes, the courts should give effect to the sound and wholesome humanitarian policies designed to be promoted by their enactment.” *Ranson, Admr., v. New York, Chicago & St. Louis Railroad Company*, 93 O. S., 223.

The principle thus announced by the Supreme Court should control the court in applying this statute, but these statutes create new rights which did not exist at common law, and at least only the ordinary and usual meaning to be drawn from the language used is as far as the courts should go in permitting a recovery.

The courts should neither add to nor take from the statute, in order that a judgment may be obtained for the benefit of the parties who had no beneficial interest in a recovery at the time the cause of action accrued.

The Legislature, in passing this act, was attempting to provide compensation for the loss which the parties named in the statute would sustain by reason of the wrongful death. It does not provide for a recovery by an administrator for the benefit of the decedent's estate, but provides that the recovery shall vest in the wife or husband and children. These are the persons who ordinarily suffer pecuniary loss by the death of either the father or the mother. It is only in case that the deceased has no husband or wife or children, that the parents or brothers and sisters ordinarily suffer pecuniary loss from his death. No doubt, for that reason the Legislature has provided for the two classes of persons receiving benefits from wrongful death.

It has not been the policy of the Legislature of this state to provide for a recovery for the benefit of either collateral heirs or creditors; and this seems to be the policy of the law-making power in other states.

So far as we have been advised the decisions of the courts in other jurisdictions are in harmony excepting the case of *Norris v. Spottenberg Railroad, Gas & Electric Company*, 70 S. Carolina, 273 (49 S. E., 854). The court in this case seems to have taken a different view, but we do think the weight of authority and better reasoning is in harmony with the cases we have cited.

We think a plain reading of these statutes prevents the prosecution of the action in the court below to recover for the unlawful death of Fred Gerrard, his wife having survived him, and the judgment of the court below is affirmed.

METCALFE, J., and FARR, J., concur.

RELIEF DENIED FROM A DITCH IMPROVEMENT WHICH PROVED DISAPPOINTING.

Court of Appeals for Lorain County.

GEORGE L. AMMON ET AL V. CONRAD A. HORN, AUDITOR, ET AL.*

Decided, May 10, 1918.

Ditches—Commissioners Encouraged to Tile a Ditch—Situation Found to be Worse After the Improvement than Before—Relief from the Assessment Denied—Lack of Benefits Not Ground for Modification by a Court of an Assessment, When.

1. In the absence of fraud or collusion no relief will be granted from an assessment for a ditch improvement, where the complaining property owners, by their action as well as by silence and acquiescence, induced the county commissioners to tile a ditch in the belief that it would be a benefit to them all, but which on actual test was found to have made the situation worse rather than better.

* A motion to certify the record in this case was sustained by the Supreme Court, but the case was subsequently dismissed for want of preparation.

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2. The authority vested in the court by Section 6500, to grant an order which will make such an assessment equitable where benefits are not shown, does not afford ground for relief from an assessment for an improvement which the community procured to be made on the theory that it would not have to be paid for by them unless it proved beneficial.

LAWRENCE, J.

This case is in this court on appeal from the judgment of the court of common pleas.

Without going into an extended statement of the facts, it seems sufficient to say that this suit arises out of dissatisfaction of certain property owners, farmers, along the line of a certain ditch in Ridgeville township. It seems that in 1913 one Shaw petitioned to the county commissioners of Lorain county for the improvements of this certain ditch. The proceedings had before the county commissioners all appear to be regular, and no complaint is made that those proceedings were irregular or erroneous in any particular. The cost of this improvement was to be assessed upon the property owners supposed to be benefited by the proposed improvement of this ditch. No complaint was made by any of the property owners, now plaintiffs in this case, as to the method of such improvement, although duly notified according to law; no complaint was made that it would not be conducive to the public health, convenience or welfare, or that the route thereof was impracticable. The hearing was had before the county commissioners as provided for by law, and the order finally and legally made by the county commissioners ordering the improvement. The contracts were let in the manner provided by law and the work was completed in this ditch.

After the completion of this work dissatisfaction arose apparently universal among the property owners, and this dissatisfaction expressed itself in the form of a petition to the court of common pleas asking for an injunction against the collection of the assessments upon the ground that no benefits were in fact obtained by the improvement of this ditch, but, on the contrary, damage was sustained by the property owners, in that

the ditch did not drain the lands of these property owners as well after the completion of this improvement as the ditch drained them before in its then state.

There are other allegations in the petition to the effect that some of the petitioners are over-assessed in that only a portion of their lands were drained by this ditch while the assessments are based upon the benefits of the whole of the land, but no evidence of a substantial nature is offered in the case bearing out this claim. We therefore treat the case as if the relief was asked solely for the reason that no benefits were obtained by this improvement by these plaintiffs.

The evidence clearly discloses that the improvement which was thus made consisting of the placing of tile in this ditch and thus making the same a blind ditch with tile of a certain size, was well known at the time of its construction by all or practically all of these plaintiffs, and no objection was made by any of them during the progress of this work as to the propriety of the same.

We have investigated the cases in Ohio which have some bearing upon the facts presented in this case, and we are unable to find a single case where under such circumstances the relief prayed for in the instant case has been granted.

The nearest approach to the granting of such relief in a similar case that we have been able to find is in the case of *Stemen v. Hizey et al*, reported in the 11th Ohio Circuit Court Reports, New Series, at page 347. In that case suit was brought to enjoin the collection of assessments levied by township trustees for a similar improvement, upon the ground that the plaintiff received no benefit from the tiling of the ditch, but the court says that:

"The contention of the defendant is this: that a court of equity can not attack by injunction the judgment of a judicial board; that if the plaintiff has any remedy at all, it is by appeal or error. With that contention of the defendant, we are in accord, if there is a provision for error or appeal.

"The question presented then is this: Could this plaintiff appeal or could he prosecute error from the judgment of the trustees of Violet township in assessing him for the construction of this ditch, when he received no benefit from it?"

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The court in that case then proceeded to show that under the statutes then in existence, relating to the improvement of ditches by township trustees, that there was no appeal provided for by the said statutes from an unjust assessment by the township trustees made against him; but the appeal which was provided for was the appeal provided for by Section 4533 of the Revised Statutes, now Section 6625 of the General Code, and in view of the fact that no appeal existed to the plaintiff in that case from the action of the township trustees, and in view of the fact that the petition in that case set forth an unjust assessment of his property for a case in which he derived no benefits, the court held that such a petition did state a cause of action, but in the case at bar it will be noted that the relief here sought is not that the property of any one of these plaintiffs is not benefitted in the same proportion that other property assessed for the construction of this ditch is benefitted, but is brought because of the fact that upon actual test of this ditch after its construction none of the property of any of these plaintiffs is benefitted by the construction of said improvement, and the claim is made that it is unlawful taking of property without due compensation to assess or tax these plaintiffs for a benefit which they do not derive. In other words, that because they originally believed and thought that the improvement of this ditch would be a benefit and thus induced the county commissioners to make the improvement and afterwards found that they were mistaken, and that it was not a benefit, that they can be relieved from an assessment which their own action and their own silence during the proceedings preliminary to the improvement and during the construction of the improvement led the county to make.

It will be noted that there is a great distinction not only between the case which is here present and the case just cited as to the facts, but there also is a very marked distinction between the two statutes granting the right of appeal. In the section providing for appeal from the action of the township trustees, the provision is:

"Any person interested in the location of such ditch or in the amount of compensation and damages determined upon by the

trustees, may take an appeal from the proceedings of the trustees to the probate court of the county by giving," etc.,

while in Section 6469, the section granting an appeal from the final order or judgment of the county commissioners made in such proceeding, the language is:

"A person or corporation, aggrieved thereby, may appeal from a final order or judgment of the county commissioners made in the proceeding and entered upon their journal, determining any of the following matters, viz:

"1. Whether the ditch will be conducive to the public health, convenience, or welfare.

"2. Whether the route thereof is practicable.

"3. The compensation for land appropriated.

"4. The damage claimed to property affected by the improvement."

We regard the contention made by the plaintiffs in this case, in view of the fact that it is now claimed that the ditch was not a benefit to any of that public who were particularly interested in this ditch, namely, the property owners and farmers along the line of the same, that their complaint is a general complaint to the effect that said ditch was not conducive to the public health, convenience, or welfare. While there may be no evidence in the case upon the question of health, yet the whole burden of this petition is to the effect that it was not conducive to public convenience or welfare, but on the contrary was a detriment to public convenience or welfare. It will thus be apparent that that was a question at least preliminarily for the county commissioners to determine, and it was a question which, when determined by the county commissioners, if it gave grievance to any one interested, could have been appealed to the probate court as provided in this section just quoted. The distinction then between the case at bar and the case so strongly relied upon as authority for the relief sought in this petition is very apparent, and the able decision of Judge Crane in *Stemen v. Hizey, supra*, can not be regarded by us as authority for granting the relief in the case at bar.

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It seems to us that in view of the decision of the Supreme Court in *Moody et al v. George et al*, found in the 37th Ohio Law Bulletin at page 189, and which apparently was based upon previous decisions of the Supreme Court, particularly the 45th O. S., 495, and the 37th O. S., 508, and in view of the decision of the same court in *Commissioners of Putnam County et al v. Krauss et al*, 53 O. S., 628, and in view of the further fact that the Supreme Court in *Blue et al v. Wents et al*, 54 O. S., at page 247, allowed the relief prayed for apparently solely upon the ground of fraud and collusion between the surveyor and the county commissioners, a thing which is not claimed or even hinted at in the case at bar, and of many decisions of courts inferior to the Supreme Court, we can come to but one conclusion as to the law of this case, and that is that in the absence of fraud or collusion a court of equity will not interfere and determine the question of benefits when the property owners interested have sat by and allowed the county commissioners to act in the manner which they have acted in this case.

A strong appeal is made to the court that under Section 6500 the court has full power to act in this case, even though there is no fraud or collusion, when a gross injustice in the apportionment is made to appear to the court, and the claim is made that gross injustice does appear in this case because of the fact which, it is claimed is proven that no benefits have accrued to the property owners, but only damage has resulted. Upon this question of whether or not benefits have accrued the state of the testimony is entirely unsatisfactory. Much testimony has been introduced on both sides of the case; much of it to the effect that damage has resulted instead of benefit; much of it to the effect that damage only occurred at a time when there was an extraordinary rainfall or much snow and ice. Even if we were inclined to exercise the power Section 6500 apparently gives to the court we would not feel justified in exercising it arbitrarily, but only upon the clearest and most conclusive showing of damages, and we doubt if under these circumstances which the evidence in this case discloses a case could be made under Section 6500 which would appeal to a court of equity,

in view of the fact that these property owners by their silence during the preliminary proceedings and the progress of this work apparently acquiesced in the work that was done; and we think that the remark of the court as contained in the 53rd Ohio State at page 634 is appropriate, the same being as follows:

“But our attention is called to Section 4491, Revised Statutes (Sec. 6500 G. C.), giving the court in which such proceeding is brought, power to enjoin an assessment. But the power conferred is not an arbitrary one. There must be a reason for the injunction—a case made. This petition, as we have shown, makes none.”

We are inclined to the belief that the laws of Ohio relating to ditches and the construction of the same can not be used for experimental purposes; that they were not intended to allow or encourage communities who wanted to make an improvement in their drainage to place this burden upon the county, upon the assumption that it would be paid for if it proved successful and not paid for unless it proved successful; to make the county and the commissioners, who are in reality and according to the theory of the law simply the agents for this purpose, guarantors to their principals of the success of an undertaking of this kind. Such a ruling is unfair to the county at large and would encourage haphazard and ill-considered plans for public improvements. Holding these views, we feel that the relief sought for in this petition should be denied, and the injunction is dissolved and the petition dismissed at the costs of the plaintiffs.

GRANT, J., and DUNLAP, J., concur.

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**AS TO THE VALIDITY OF MECHANIC'S LIENS FILED
AFTER TIME.**

Court of Appeals for Hamilton County.

AGNES PARK V. THE WILLIAMSON HEATER CO. ET AL.*

Decided, May 20, 1918.

Mechanic's Liens—Lien Holders Protected Where Failure to Follow the Strict Letter of the Law Was Due to Deception Practiced by the Owner—Time for Filing Liens Where Work is Left Incomplete.

1. The validity of a mechanic's lien is not affected by failure of the contractor or material-man to follow the strict letter of the statute in the matter of furnishing to the owner or his agent a sworn and itemized statement as required by Section 1283, G. C., where such failure was due to deception practiced by the owner. In such a case the sending of a copy of the lien placed on record, addressed to the name used by the owner in making the contract, is a sufficient compliance with the statute and the lien so perfected will be held good.
2. Where heating apparatus was placed in a building and nearly all of the labor performed in June, but the registers were not installed or connections made until November, the filing of a mechanic's lien within sixty days of completion of the work was within the time prescribed by the statute.
3. But where a plumber does a part of the work on a building and a year later files a lien, the work in the meantime having been completed by another plumber at the instance of the owner, the lien is not filed within time and is void.
4. The lien of a painter, who left the job unfinished and filed a lien more than sixty days after the furnishing of the last material and labor, is also void for failure to file within the prescribed time.

Jas. R. Jordan and Hicks & Hicks, for Agnes Park.

H. J. Buntin, for Williamson Heater Co.

Bates & Bates, for Nitzschman & David.

C. S. Burdsall, for Gilbert Kerley and Max Liederman.

*Affirming in part *Park v. Williamson Heater Co. et al*, 20 N.P.(N.S.),

BY THE COURT.

This action comes into this court on appeal from the Court of Common Pleas of Hamilton County.

The original action was brought by Agnes Park against the Williamson Heater Co., Harry Nitzschman and Edward David, doing business under the firm name of Nitzschman & David, Gilbert Kerley and Max Liederman. Max Liederman was the principal contractor in the construction of a dwelling-house on Hawthorne avenue, in Cincinnati, Ohio; and the three sub-contractors, the Williamson Heater Co., Nitzschman & David and Gilbert Kerley, each claimed a mechanic's lien of record against said premises.

Plaintiff's action is one to quiet the title of the premises against these several liens.

Defendants by way of several cross-petitions seek to foreclose their liens.

Plaintiff claims that these liens of defendants are void for the reason that they were not filed within sixty days from the last of the material and labor furnished as required by G. C., 8314, and further that neither the head contractor nor the sub-contractors made out and gave to the owner or her agent a sworn and itemized statement, as required by Section 1283 of the mechanic's lien law. Plaintiff admits the receipt of notices of the filing of the several liens.

Without entering into a general discussion of the lien laws applicable to the case we shall content ourselves by saying that any defect on the part of the defendants in following the letter of the law and in furnishing sworn and itemized statements was due to the deception practiced by the plaintiff, and the service of the copy of the lien filed must be held to be a substantial compliance with this provision of the statute.

We are of the opinion that the lien filed by the defendant the Williamson Heater Company was filed within sixty days from the furnishing of the last of the material and labor. The evidence shows that while all of the material was furnished and nearly all of the work and labor performed in the month

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of June, 1914, some work was done by way of connecting up of the furnaces and installation of the registers by the heating company on the 28th day of November, 1914, and on December 5, 1914, the said Williamson Heater Company duly placed its mechanic's lien on record in Hamilton county, Ohio, and on the same date a true copy thereof with the notice of the furnishing of the heating apparatus and cost thereof was addressed to "Anna Mey," the name under which plaintiff had contracted for the construction of the house. This was in compliance with the statute and this lien must be found good.

The lien claimed by the defendants Nitzschman & David is based on their claim for plumbing. The evidence discloses that the last work performed by these defendants on the plumbing was in the fall of 1914; that there was certain work to be done on the plumbing, but that the same was never performed by the said defendants, but was procured by plaintiff or her grantee to be done by other parties; that these defendants claimed they did not discover that some one else had done the work until April 18th, 1917. The mechanic's lien claimed by these parties was placed upon record the 22d day of October, 1915. It is therefore clear that the lien having been placed on the property more than one year after the last work had been performed and material furnished, it was filed too late. Neither can they successfully claim a lien by reason of the unperformed part of the work, as there is no claim that a lien was filed after the discovery that the work had been done by others, and the lien is claimed only on account of labor and material furnished prior thereto. We must therefore hold this lien to be void and of no effect.

The same facts appear from the testimony of defendant Gilbert Kerley with reference to his claim for painting, except as to some little difference in the dates as to when the last work was done and the filing of the lien. The filing of Kerley's lien, as shown by the evidence, was more than sixty days subsequent to the furnishing of any material or labor, and said defendant admits that the unfinished part of his contract, if any, has not yet been completed, in so far as he knows. It is there-

fore clear that no lien can be predicated upon the unfinished work.

We therefore hold that plaintiff is entitled to the relief prayed for, upon the payment of the claim of the Williamson Heater Company, and upon the failure to pay this money a decree in foreclosure and sale of the premises may be had to satisfy such claim; that the liens claimed by the defendants Nitzschman & David and Gilbert Kerley are void and of no effect, and the title may be quieted as against these two alleged liens.

JONES, P. J., and HAMILTON, J., concur; WILSON, J., not participating.

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Lucas County.

**RECOVERY FOR LOSS FROM FIRE CAUSED BY A PASSING
LOCOMOTIVE.**

Court of Appeals for Lucas County.

TOLEDO TERMINAL RAILWAY V. CLINTON A. MAUK ET AL.*

Decided, June 24, 1918.

Joinder—Insured and Insurer Proper Parties Plaintiff to Action for Recovery of Fire Loss Caused by Locomotive—Evidence that Sparks Were Emitted by More than One Locomotive Not Prejudicial—Competency of Evidence as to Sparks from Locomotive Failing to Set Fire to Combustible Material Placed Beside the Track—Section 8970.

1. Section 8970, General Code, creating an absolute liability against a railway company for loss of property by fire on evidence showing that the fire originated from sparks from an engine passing over its tracks, inures both to the owner of the property destroyed and by way of subrogation to insurance companies making payment to the owner for loss under policies of insurance issued by them, and the owner and insurance companies may join as parties plaintiff in an action to recover losses so originating.
2. Under the rule allowing the owner of property destroyed by fire from sparks from passing locomotives, considerable latitude in showing the particular circumstances existing from which the fire is caused, evidence that more than one locomotive of the defendant company emitted sparks on various occasions is not prejudicial in an action under Section 8970, General Code, to recover for fire loss from sparks emitted by a locomotive sufficiently identified as being in fault on the occasion in issue.
3. Evidence in an action for fire loss from sparks from a locomotive of experiments made by expert witnesses, called by a defendant railway, to establish that certain substances placed along its right-of-way would not take fire from sparks, when not under conditions similar to those existing at the time of the fire complained of, is properly excluded.

Potter & Carroll, for plaintiff in error.

Elmer E. Davis, J. W. Mooney and G. E. Bibbee, contra.

RICHARDS, J.

Clinton A. Mauk was the owner of a large quantity of lum-

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, November 19, 1918.

ber and the operator of a lumber yard all situated in the northerly part of the city of Toledo, most of the lumber being in two large sheds owned by the Ann Arbor Railway and a portion of the lumber being in another shed owned by Mr. Mauk. These sheds were located near various switching tracks of the Toledo Terminal Railway and other switching tracks of the Ann Arbor Railway. The property was destroyed by fire on the night of October 15, 1916, the fire resulting in nearly a total loss. The property owned by Mr. Mauk was insured in several insurance companies to the amount of \$38,000 and this amount was paid by these companies to him. Thereupon Mr. Mauk and the nine insurance companies united as plaintiffs in an action against the Toledo Terminal Railway to recover the value of the property destroyed by fire, the insurance companies claiming to be subrogated to the rights of Mr. Mauk to the extent of the sums paid by them severally. The petition was met by a motion to separately state and number the causes of action and to make more certain and definite, which motion was overruled by the court. Thereupon the defendant filed a demurrer to the petition on the grounds of a misjoinder of parties plaintiff and for the reason that several causes of action were improperly joined and for want of facts. This demurrer was overruled and an answer filed by the defendant. A trial of the case resulted in a verdict and judgment being rendered in favor of the plaintiffs in the amount of \$70,000. We are asked to reverse this judgment for various reasons, but chiefly because it is claimed that the court erred in overruling the motion and demurrer, and because the judgment is not sustained by sufficient evidence, and because the court erred in the admission and exclusion of evidence and in the charge to the jury.

We have no difficulty in reaching the conclusion that the petition sets forth but one cause of action and that the same is set out with sufficient certainty. There was but one fire pleaded and that is averred to have been caused by sparks emitted from an engine of the railroad company. The cause of action was based on a single wrongful act. The owner of the property was, of course, the primary sufferer by reason of the fire and no doubt can exist but that the insurance companies upon making payment under the policies issued by them became sub-

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rogated to the rights of the assured to the extent of the payments so made. The averments of the petition show that the loss largely exceeded the amount of the insurance and it is, therefore, clear that not only the owner, but the insurance companies were interested in maintaining a suit against the defendant.

While there are some differences in detail between this case and the case of the *Lake Erie & W. Ry. v. Falk*, 62 Ohio St., 297, and while there has been some change in the statute since the announcement of that decision, yet the principles therein set forth indicate very clearly the rules which should govern in the case at bar. It is claimed that under the statute, as it now reads, Section 8970, G. C., the railroad company is liable to the owner of the property absolutely, but that the liability to the insurance company arises only on averments and proof of negligence on the part of the railroad company. It is true that the statute cited provides that the company shall be liable for all loss or damage by fires originating on adjacent lands caused in whole or in part by sparks from an engine passing over such railroad, and the exercise by such company, or receiver of such company, of due care in equipping and operating such engine shall not exempt such company, or receiver of such company, from liability. This statute does create as against the railroad company an absolute liability on evidence showing that the fire originated from sparks from an engine passing over its railroad, but when an insurance company, having a policy upon property destroyed by fire from sparks coming from an engine passing over a railroad adjoining the property, has made payment under its policy, it is by general principles of equity subrogated to the rights of the assured and that subrogation is to all rights of the assured as against the railroad company to the extent of the amount paid by the insurance company. It would seem clear, therefore, that the statute inures to the benefit of the insurance company so making payment as well as to the assured.

Manifestly all the rights given by the statute could be secured by the owner bringing an action against the railroad company, which is claimed to have caused the fire, in which action, whether he had received the amount of the insurance

on the property or not, he would be entitled, if the proof showed liability, to recover the full value of the property destroyed and this would raise an equity in favor of the insurance companies against the assured in the fund received by him from the railroad company.

Furthermore, a person whose property is insured and who suffers loss by reason of a fire has a right to assign his cause of action and the assignee would be entitled to all the benefits conferred by the section above cited and clearly whatever rights could be acquired and enforced indirectly may be enforced directly in an action by the assured and the companies which have made payment under their policies. In truth, the action at bar is an action by the owner of the property to recover the full amount of the loss from the railroad company, and the fact that the insurance companies are united with him as co-plaintiffs can in no manner prejudice the rights of the railroad company, but enables the court to adjust the equities of the plaintiffs among themselves.

The rule is stated in *Clement, Fire Insurance*, 369, as follows:

“When a statute or code of practice authorizes suit in name of real party in interest, and a number of insurance companies are subrogated as equitable assignees of rights of insured against a railroad company, they may properly be joined as plaintiffs in an action against the latter to recover the loss or damage. If the insured has an interest or his whole loss was not paid by the insurance companies, he should be also joined as a party to the action, either as a plaintiff by his consent or as a defendant if he refuses.”

We hold in view of reason and authority that the owner and the insurance companies which have made payment may unite in an action against the railroad company where the total loss suffered exceeds the amount of the insurance on the property. It follows that the court committed no error in overruling the motion directed to the petition, nor in overruling the demurrer thereto.

A large mass of evidence was taken in this case bearing upon the manner in which the fire originated which caused the destruction of the property. The evidence shows that the fire

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originated in or near what is known as shed No. 1, one end of which was located within twenty-five or thirty feet of the tracks of the Toledo Terminal Railway, and the fire spread from this shed to the other two resulting in the destruction of all of them. These sheds were constructed of lumber and shed No. 1 had an open unboarded space about nine feet from the ground extending the entire distance around it.

The fire started about midnight on the night of October 15. It is in evidence that there had been no fires in these sheds during that fall, and although there was a stove in one of them, no fire had been built therein since the preceding spring. Shortly before twelve o'clock on the night in question a switching engine belonging to the Toledo Terminal Railway passed back and forth by this property several times, part of the time hauling a train of cars and part of the time without any load. The engine was observed by a watchman, located in the vicinity, who testifies that when loaded the engine continually threw sparks; that he observed it on that night and had on numerous occasions prior to that time; and that the terminal engines all threw sparks when "working heavy and exhausting."

The evidence shows beyond question that the wind on that night was blowing at the rate of fourteen to fifteen miles per hour and in the general direction from the terminal tracks toward these lumber sheds. The evidence discloses that the Ann Arbor Railway had no engine in operation during that day or night in this neighborhood except a passenger engine which traveled along the main track, many hundreds of feet distant from the shed in which the fire originated, and that engine passed some hours before the fire was seen. There is no evidence in the record showing any fires in that neighborhood during the day or night of October 15 except the sparks flying from the engine of the terminal railroad company. It also appears that an employee visited the yards at four o'clock on the afternoon before the fire and found the buildings locked. We have no hesitancy in reaching the conclusion that the jury was entirely justified in finding that the fire originated from sparks coming from this engine. Indeed, we do not see how they could have reached any other result from the evidence contained in the record.

In the case of *Lake Shore & M. S. Ry. v. Anderson*, 7 C. C. (N.S.), 17, the circuit court held that a jury is warranted in finding that a fire originating on land adjacent to the railroad company's right-of-way was started by sparks emitted from locomotives when the evidence shows that it originated very quickly after two locomotives had passed along, that the day was windy, with the wind blowing from the railroad toward plaintiff's land and of sufficient force to carry sparks thereon and that there were no other fires in the particular neighborhood at the time. All of the requirements mentioned by the court in that case exist in the case at bar and we are not, therefore, able to say that the verdict is not sustained by sufficient evidence.

It is said, however, that the verdict against the railroad company was produced because the court permitted the plaintiffs to introduce certain incompetent evidence and excluded from the jury certain competent evidence offered on behalf of that company. The evidence which the court allowed to be introduced, and against which objection is especially made, related to the engines of the terminal railroad company throwing sparks on other occasions within two or three weeks prior to the time of this fire. In view of the fact that the particular engine which passed along this track on that night was identified, we see no necessity for the plaintiff to introduce evidence that was broad enough to include any other engine than that one, but the evidence which was introduced did, in fact, include engine number seven which was the one that passed the sheds on the occasion, and we can see no prejudice resulting to the railroad company by the inclusion of evidence showing that other engines of the company also emitted sparks.

The courts have frequently indicated that in an action brought by a land owner to recover for destruction of his property by fire claimed to have been caused by sparks from passing engines considerable latitude should be allowed because of the usual inability of the plaintiff to specifically show the particular circumstances existing which caused the fire. This principle is stated in *The Lakeside & M. Ry. v. Kelley*, 10 C. C., 322, and was recognized by this court in *The Hocking Val. Ry. v. James*. 18 C.C.(N.S.), 210; (1 App., 335). The case of *The Hanover*

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Ins. Co. v. C., H. & D. Ry., 18 C.C.(N.S.), 502; (2 App., 136), decided by this court contains nothing inconsistent with what has just been stated. In that case, as in this, we recognize that there should be either direct proof of facts establishing the plaintiff's case or proof of facts from which liability may be reasonably presumed and that there can be no guessing by either court or jury.

The trial court excluded evidence of the results of certain experiments made by expert witnesses called by the railroad company to establish that certain substances placed along the right-of-way would not take fire from sparks emitted from passing engines. An examination of the evidence and offers to prove contained in the bill of exceptions shows that the experiments sought to be proven were not made under conditions sufficiently similar to those existing at the location of this fire and at the time of its occurrence to render the results of the experiments competent evidence. The inherent difficulty of reproducing conditions similar to those existing at the time and place of the fire made it practically impossible to render these experiments of value to the jury in ascertaining whether the property of Mr. Mauk was set on fire by sparks from the railroad company's engine. It is said in *Jones, Evidence*, 1913 Ed., Section 410, that testimony ought not to be received as to experiments unless it shows they were under such conditions as to fairly illustrate the point in issue; and that from the nature of the case the decision of this question must rest largely in the discretion of the trial judge. We find no prejudicial error in excluding evidence of the results of experiments made by these witnesses.

The railroad company sought to offer evidence that the lumber yards of Mr. Mauk had been, before the occasion of the fire, frequented by tramps and loafers and that fires had been seen in the yards on various occasions. This evidence was excluded by the trial court and is assigned as error. It must be noted that the trial judge did not exclude evidence as to whether any person had been in or about the yards or buildings on the day or night when the property was destroyed by fire. On the contrary, the trial judge allowed evidence of some unknown man passing along a path through the Mauk lumber yards at about

the hour of eleven o'clock on the night of October 15. The evidence excluded related to occasions prior to the day of the fire and no offer was made to show the existence of any fire in or adjacent to the yards on October 15, or of tramps or other persons being in or about the same on that day. Furthermore, the railroad company did not offer to show the character or extent of any fire which had been theretofore seen in the lumber yards nor that the same was caused by any improper person; for aught that appears in the questions and offers to prove, the fires which were seen may have been started by Mr. Mauk himself or his employees in cleaning up the lumber yards and may have been, and doubtless were, entirely under control. If all the evidence which was offered by the railroad company on this branch of the case had been received it would only have shown that on prior occasions tramps and loafers had been seen in the lumber yards and fires had been seen there prior to October 15, and from this evidence the jury could only have been asked to guess that the fire which destroyed the property might have originated from tramps or loafers starting fires on the premises. We think such evidence would not tend to show that the fire which originated on the night of October 15 was caused in that manner. A test of the admissibility of such evidence may be made by applying the rule to the plaintiffs in the trial court if we assume that the plaintiffs had been able to show only that engines of the railroad company were accustomed to emit sparks when hauling loads through these yards and on these switch tracks but were not able to show that any engine had passed along the track near these yards on that day or evening. The plaintiffs manifestly would have fallen far short of making a case and the jury could have only rendered a verdict in favor of the plaintiffs on such a showing by guessing as to the origin of the fire. For all these reasons we find that the trial court committed no error in excluding the class of evidence mentioned.

The defendant railroad company introduced evidence showing that the engine crew of the railroad company after observing the fire, went on the engine to the vicinity of the fire and the court permitted them to describe the conditions that they found existing at the time of their arrival, but excluded evidence of

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the purpose for which they had come. The offer made shows that the company desired to prove that they had come to the fire with apparatus attached to their engine for the purpose of aiding in extinguishing the fire but were unable to use the same because the fire was then in the end of the shed most distant from the railroad tracks. The trial court committed no prejudicial error in excluding the purpose which the engine crew had in mind in going to the fire, for that purpose could not aid the jury in ascertaining the liability or non-liability of the railroad company. The particular location of the fire was permitted to be shown by all witnesses who had knowledge of the same. It is not controverted that the shed in or near which the fire originated was three hundred and fifty feet in length and if the fire were, as claimed by the railroad company, in the farther end of the shed, it, of course, could not have been reached by the hose attached to the locomotive engine and the purpose of the engine crew was immaterial.

Finding no prejudicial error, the judgment will be affirmed.

CHITTENDEN, J., and KINKADE, J., concur.

HARDSHIP IN THE PUBLIC UTILITIES ACT.

Court of Appeals for Fairfield County.

HOCKING GLASS CO. v. OHIO LIGHT & POWER CO. ET AL.*

Decided, June 2, 1918.

*Rates for Electric Current—Public Utilities Act Permits Advance—
Notwithstanding Existing Contract Obligations with Customers—
Courts Unable to Give Relief.*

1. It is not within the province of the courts to afford relief from the drastic provisions of the public utilities act, which change or modify the ancient rule as to contract, the remedy against the inconvenience and hardship caused thereby being in the law-making branch of the government.

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, November 26, 1918.

2. Injunction does not lie against an electric company, which threatens to cut off the current supplying the plaintiff's plant because of refusal to pay therefor under a new and higher schedule, approved by the Public Utilities Commission subsequent to the entering into a contract with plaintiff at the lower rate and the arranging of its plant on the faith thereof and at considerable expense for the exclusive use of said current.

T. S. Hogan and Ben R. Dolson, for plaintiff.

M. A. Daugherty, M. F. Millikin and J. P. Van Der Voort,
contra.

HOUCK, J.

This case is here on appeal from the common pleas court of Fairfield county, Ohio.

The conceded facts, as presented by the pleadings in the case and agreed to by counsel in oral argument, are:

That plaintiff is a corporation duly organized, incorporated and existing under the laws of Ohio, with its principal place of business at Lancaster, Fairfield county, Ohio. The defendant, the Ohio Light & Power Company, is a public utilities corporation organized under the laws of Ohio, and is made up by the consolidation and combination of a large number of separate and formerly independent electricity producing and distributing companies. The defendant, Edward Matt, is the superintendent of the said the Ohio Light & Power Company. The defendant has constructed its service lines and has established its service distributing equipment and facilities in and through Fairfield county, Ohio, and is now engaged in selling and distributing electricity to its consumers and customers in various municipalities and localities in said county. Plaintiff is the owner of and is engaged in operating a plant and factory for the manufacture of glassware, the same being located in Hocking township, Fairfield county, Ohio, and contiguous to the city of Lancaster. In September, 1915, the Hocking Glass Company and the Ohio Light & Power Company entered into a contract for the purchase and sale of electric energy, under the terms and provisions of the schedule at that date on file and in effect with the Public Utilities Commission of Ohio. Said contract was made upon what is known as Schedule No.

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11, applicable to wholesale power, and appears in P. U. C. O. No. 3, of the Ohio Light & Power Company's schedule for Lancaster, covering electric service, issued May 1st, 1915, and becoming effective June 1st, 1915. On May 29, 1917, the Ohio Light & Power Company filed Supplement No. 2, P. U. C. O. No. 3, this supplement becoming effective June 30, 1917. This supplement sought to cancel and supersede Schedule No. 11 of the Ohio Light & Power Company, set forth in P. U. C. O. No. 3. On August 1st, 1917, the Ohio Light & Power Company rendered the plaintiff a bill for electric energy used during the month of July, 1917, at the rates and under the terms and conditions set forth in the new schedule. The plaintiff refused to pay the bill as rendered, but in place thereof forwarded the Ohio Light & Power Company a check for the electric energy delivered to it during the month of July preceding, at the rates set forth in Schedule No. 11, in effect at the time of the making of the contract, as aforesaid, and stipulating that it was in full payment of all electric energy delivered during the month of July, 1917. The Ohio Light & Power Company refused to accept this check, and notified the plaintiff that unless payment of its account was made in accordance with the terms and provisions of its claimed new schedule that it would, at the expiration of ten days from date of such notice disconnect its lines from the property of plaintiff, and would no longer furnish the plaintiff electric energy under existing conditions.

Under the provisions of the franchise by which the Ohio Light & Power Company operates in the city of Lancaster, Ohio, there are no provisions as to the rates which may be charged by the company, and further, the city of Lancaster has enacted no rate regulating ordinances establishing the rates which may be charged by public utilities operating electric light, heating and power plants, in said city.

The relief sought by plaintiff in its petition is that said defendants be enjoined from shutting off the service of electricity from plaintiff's plant and factory, and from disconnecting the service lines and service distributing facilities of defendants from plaintiff's motors, air-compressors, and other equipment and machinery in plaintiff's plant and factory, and

from withdrawing from or depriving plaintiff of said service of defendants, and from doing any act or thing, directly or indirectly, that would operate, or would tend, directly or indirectly, to deprive plaintiff of a sufficient supply of electricity to maintain plaintiff's said plant and factory in full operation; and upon final hearing that a permanent injunction be granted; and for such other relief as may be proper in the premises.

Learned counsel for plaintiff lay down three propositions which they claim are decisive of the present case, and fully authorize the granting of the relief prayed for in plaintiff's petition:

1. That the Legislature of Ohio has not conferred upon the Public Utilities Commission of Ohio authority to fix basic rates, saving and excepting in cases of appeal to that body, thereby leaving it entirely open and free for parties to fix their own rates for service by agreement.

2. That the parties hereto had a right to enter into a private contract, and that such contract is valid, and can not be set aside or abrogated by the filing of a future schedule or schedules with the Public Utilities Commission of Ohio.

3. That under the facts and the law, defendants and each of them are estopped from setting up the defenses claimed by them to be a bar to the relief sought by plaintiff.

To us there is but one question involved in this suit, namely, did the filing of the new schedule with the Public Utilities Commission of Ohio, by the Ohio Light & Power Company, after the making of the contract between it and the Hocking Glass Company, set aside and abrogate the previous contract? It therefore follows that in order to properly solve this question it is necessary to determine the purpose, scope and extent of such parts and provisions of what is known as the public utilities act of Ohio as may be applicable to the facts in this case, and which are contained in Sections 614-14 and 614-20 inclusive.

It is maintained by counsel for plaintiff that a proper and legal adoption of a new schedule of a public utility, by the Public Utilities Commission of Ohio, does not supersede or supplant a contract previously entered into.

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It must be conceded that when the Legislature of Ohio passed the public utilities act, it did so for some reason, and that it had some object in view at the time. This leads us to inquire what it was. The public utilities in our state had become numerous, and there was almost endless litigation resulting therefrom. Our courts had become clogged with this class of litigation, and the Public Utilities Commission was created by law as and for a clearing house through and by which the rights of public utilities and those dealing with them could be properly determined, settled and disposed of, without burdening our courts with that kind of litigation, which in many instances lasted for years, and in the end the conclusion reached seemingly failed to satisfy either litigants or the public. The process of reaching these conclusions was entirely too slow. True, the act in question is what may be termed progressive legislation, but we are living in a time and age of advancement and we must be prepared to meet such, and conform our business affairs to same.

An examination of the provisions of this act leads us at once to conclude that in many ways it is most drastic, and especially wherein it changes or modifies the ancient rule as to contract, but to this we must accede, because it is the law and was the law when the contract upon which plaintiff relies was entered into. We are bound to know the law, and it being statutory and in full force at the time of the making of said contract, the statute must and does govern.

After the initial filing of rates, as required in Section 614-16, the further provision is found in Section 614-20 that such rates so established are not to be changed unless ordered by the Public Utilities Commission, save and except by thirty days' notice to said commission, or by the filing of new schedules thirty days prior to the time they are to take effect. By the conceded facts it is shown this procedure was clearly followed by the Ohio Light & Power Company.

Plaintiff further urges that defendants, having induced it to act to its substantial and irreparable injury and damage in changing its plant so as to permit of the defendants' service exclusively, that they, the defendants, are estopped from maintaining their alleged defenses.

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discuss this question at length, by saying that upon the facts of plaintiff is not well founded. The right and authority to do just what plaintiff complains of here was delegated by the Legislature of Ohio to the Public Utilities Commission, under and by virtue of the provisions of the public utilities act. By virtue of that act the defendant company had full and complete authority to do just what it has done in the premises, and the courts can not legally take from it this right. Mr. Justice Day, of the United States Supreme Court, has laid down a rule of law clearly applicable to this case, and we hold that it is decisive of it. While the rule was applied to an act of Congress, yet it is clearly applicable to a law enacted by a state legislature. We refer to the case of *Western Union Telegraph Co. v. McCall Publishing Co.*, 181 U. S., page 92, in which Justice Day, speaking for the court, says:

"It may be, as urged by petitioner, that this construction renders impossible the making of contracts for the future delivery of such merchandise as the petitioner deals in, and that the instability of the rate introduces a factor of uncertainty destructive of contract rights heretofore enjoyed in such property. This feature of the law, it is insisted, puts the shipper, in many kinds of trade, at the mercy of the carrier, who may arbitrarily change a rate upon the faith of which contracts have been entered into. But the right to make such regulations is inherent in the power of Congress to legislate respecting interstate commerce and such considerations of inconvenience or hardship address themselves to the law-making branch of the government. *New Haven Railroad Company v. Interstate Commerce Commission*, 200 U. S., 399. It may be that such contracts should be recognized, giving stability to rates for limited periods; that the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done; but, as we have said, such considerations address themselves to Congress, and not to the courts. It is the province of the judiciary to enforce laws constitutionally enacted, not to make them to suit their own views of propriety or justice."

The rule is well known that courts are bound to construe and interpret laws as they come from the Legislature, and can

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modify or change them at will, although such laws may seemingly work a hardship.

If the public utilities act of Ohio, as it now stands, is found inadequate, or does not fully meet the demands of the people, the remedy is with the Legislature and not the courts.

Under the facts, and the law governing them, we find for the defendants. Petition of plaintiff dismissed.

POWELL, J., and SHIELDS, J., concur.

ALLEGATIONS AS TO OBSTRUCTION LEFT IN THE STREET.

Court of Appeals for Summit County.

HOWARD McMILLEN V. CITY OF AKRON.

Decided, October, 1918.

Pleading—Allegations of Special Facts—Sufficient in a Negligence Case, When—Action for Damages to Automobile Caused by Obstruction in Street.

1. Where a petition alleges specific facts which constitute a *prima facie* cause of negligence, demurrer does not lie on the ground that the negligence is not alleged in terms.
2. Allegations to the effect that an iron standard, four feet high, weighing fifty pounds and of the kind sometimes placed near the outer rail of a street car line for the purpose of regulating traffic, was left in the street near an intersection on a very dark night and while plaintiff was driving his automobile slowly along said street he ran into said obstruction and damaged his car for which he asks judgment against the municipality, states a cause of action and the petition is not open to demurrer.

Jonathan Taylor, for plaintiff in error.

Owen M. Roderick, contra.

LAWRENCE, J.

Error to the court of common pleas.

The plaintiff in error, who was plaintiff below, commenced an action against defendant in error, the city of Akron, before a justice of the peace, wherein a default judgment was rendered in his favor. The case was appealed to the court of common

pleas by defendant, in which court a demurrer was sustained to the petition of plaintiff on the ground that it did not state facts showing a cause of action; and the sole question presented here for our consideration and determination is, did the court below err in sustaining said demurrer.

The petition, in substance, alleged that South Main street is one of the main thoroughfares of the defendant city, and that there is a double track street car line running through its center; that the city had placed on both sides of said tracks, near the intersection of Main street with Market street and within a couple of feet from the outer rails of said tracks, iron standards weighing approximately fifty pounds and of a height of about four feet; that these standards are placed on and removed from the line of traffic as the city considers proper for the regulation thereof; that at or about 9 o'clock P. M., May 5, 1917, the plaintiff was driving his automobile northerly in a proper, careful and lawful manner at a speed of about 5 miles per hour at the right hand side of Main street; that the evening was extremely dark; that near the intersection of said streets his automobile crashed into one of the standards which had been left standing through failure of defendant city to remove the same, and damaged and injured his automobile in the sum of \$250; that there were no lights, warning or marking of any kind on said standard and the presence of the same was unknown to plaintiff, and that because of the failure of the defendant city to light the same or indicate in some way or by some warning the presence of the standard, plaintiff's automobile was damaged as aforesaid.

We are of the opinion that the petition alleges specific facts making a *prima facie* case of negligence and is not demurrable because negligence is not alleged in terms, and we therefore hold that the demurrer to the petition was improperly sustained in the court below, and its judgment will be reversed and the case remanded for further proceedings.

GRANT, J., and DUNLAP, J., concur.

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Cuyahoga County.

WOMAN INJURED IN A PICTURE THEATER.

Court of Appeals for Cuyahoga County.

ELIZABETH FOX V. THE BRONX AMUSEMENT CO.*

Decided, June 17, 1918,

Negligence—Failure to State Cause of Action to Jury—Not Ground for Dismissal—Where the Facts Recited Warrant Application of the Doctrine of Res Ipsa Loquitur—Specific Grounds of Negligence Not Required in Such a Case.

Where a woman after purchasing a ticket enters a motion picture theater during a performance and takes one of the seats provided for patrons, and during the performance the seat upon which she is sitting gives way, causing her to fall upon the floor and to suffer a miscarriage, the doctrine of *res ipsa loquitur* applies; and in an action for damages resulting it is error, after counsel for plaintiff has stated the case to the jury, to grant a motion to dismiss on the ground that the said statement did not embody a cause of action against the defendant.

Henderson, Wickham & Maiden, for plaintiff in error.

Kerruish, Kerruish, Hartshorn & Spooner, contra.

LAWRENCE, J.

This case is here on error to the court of common pleas, and is an action brought by plaintiff in error, who was plaintiff below, against defendant in error, to recover damages for injuries which she claims have been sustained by her by reason of the negligence of defendant.

The plaintiff in her petition alleged that on the 28th day of October, 1916, that the defendant company owned and operated a theatre, known as the Jewel Theatre, located on St. Clair avenue, Cleveland, Ohio, in which theatre public exhibitions were had and admission charged therefor; that on that day she purchased a ticket and entered said theatre; that

* Motion to certify record overruled by the Supreme Court on November 19, 1918.

she was shown to or took a seat that defendant had provided among others for the use and occupancy of its patrons; that shortly after she had occupied said seat, the bottom part of it broke, throwing her to the floor and injuring her in certain particulars specified therein, and alleging that said accident was solely and proximately caused by the defendant's negligence and specifying the particulars thereof.

The defendant by answer denied all the allegations of the petition, except that it is an Ohio corporation; that on the day of the alleged accident it operated the Jewel Theatre and charged admission; that plaintiff was a patron at said theatre and had entered it for the purpose of viewing the picture exhibited; and that it provided all of the seats that were in said theatre at said time.

After the empannelling of and statement of plaintiff's case to the jury, the defendant made a motion to dismiss the petition for the reason that plaintiff did not state a cause of action against the defendant. This motion was sustained, plaintiff's petition dismissed and exception noted by the plaintiff. Motion for new trial was overruled, and error is now prosecuted in this court to reverse the judgment of the court below.

The opening statement of the case to the jury is as follows:

"If Your Honor please, and gentlemen of the jury, the facts in this case are brief so far as a statement of them is concerned.

"Along about the latter part of October, possibly along about the 27th or 28th, Mrs. Fox, the plaintiff, with her husband, who are living in Cleveland, and were at that time living in Cleveland near the Jewel theatre on St. Clair street, near 118th street, went to see the pictures in the theatre on that night; bought tickets, paid their admission, whatever it was, five cents possibly, and took seats in the theatre. Mrs. Fox at that time was pregnant with child, probably three months, and during the performance, and not very long after they had taken seats, the bottom of the seat fell almost completely out, letting her fall to the floor and upon her knee, which was partly under the seat. One side of the bottom of the seat broke away from the fastenings; the other side was held up partially by an iron or steel brace, so the bottom of the seat did not fall completely down, one end was stuck up, but she fell clear down to the floor on her knee. She stayed thereuntil almost completely

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recovered, and then she was taken out by Mr. Fox. On the way out they spoke to one, who appeared to be in charge of the theatre, whom we will prove to be Mr. Kalafat. She was taken home, and in two or three days after that began to feel the effects so far as her pregnancy was concerned, having pains in her back and began menstruating, and was taken care of as well as her husband could take care of her. She had relatives in Youngstown, and was taken there, and was attended by a doctor in Youngstown, who is here and will tell you the exact extent of her injuries. She lost the child, with which she was pregnant at the time she fell; and she has now, in her left leg, what is known to the medical profession as phlebitis of the blood vessels, that is a clot that is formed there, and she now has to wear a rubber bandage, and is under almost constant pain, especially when she walks, and it is, as the doctor will testify, a permanent injury.

"We claim that under her contract of admission to the theatre it was the duty of this defendant company to furnish her with a proper seat to see the exhibition which she paid to see; and that these injuries are directly and only caused by their failure to furnish her a proper seat; and that her injuries, through that, will go with her as long as she lives; and in addition the loss of the child, to which in all probability she would have given birth.

"Upon these facts, if we prove them, we will ask damages at your hand in an amount which will fairly compensate her for the injuries she sustained by reason of the negligence of this company in that respect."

It will be seen that the sole question presented for our determination is, does the foregoing statement to the jury state a cause of action against the defendant?

Plaintiff had alleged in her petition specific grounds of negligence; however, such were not included in the statement to the jury. In the view we take of the case it was unnecessary to either allege or state the specific grounds of negligence causing the injury. This theatre was under the management of the defendant, and in the ordinary course of things such accidents do not happen if proper care is used. The plaintiff was lawfully in this theatre, had an implied invitation not only to enter the theatre but to occupy a seat provided by the management thereof, and she had a right to rely upon the safe

condition of the seat provided for her, and the breaking of the seat itself affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

Without further comment, this court is unanimous in the view that the doctrine or principle of *res ipsa loquitur* should apply to the case under consideration.

For error in dismissing plaintiff's petition, the judgment of the court of common pleas is reversed and the case remanded for further proceedings.

GRANT, J., and DUNLAP, J., concur.

CHARACTER OF WARRANTY UNDER WHICH GOODS ARE SOLD.

Court of Appeals for Hamilton County.

THE TALGE MAHOGANY COMPANY v. JOHN N. QUINN, DOING
BUSINESS AS QUINN & COMPANY.*

Decided, May 27, 1918.

Warranty—Express or Implied—Refusal to Admit Evidence Tending to Establish an Express Warranty—Constitutes Error, When—Application of Section 8392—Sales—Efficiency of the Apparatus Sold.

Where the plaintiff has declared upon a written contract for certain equipment sold to the defendant at a specified price, and the defendant by way of counter-claim sets forth certain representations in the nature of guaranties or warranties as to the economy which would be effected by the use of said equipment, which representations were not realized but on the contrary the new equipment proved to be more expensive to operate than the old, the section of the statutes relating to express warranty (8392) applies and it is error to limit the introduction of evidence tending to prove an implied as distinguished from an express warranty.

Howard N. Ragland and Horace A. Reeve, for plaintiff in error.

Burch, Peters & Connolly and Walter D. Murphy, contra.

*Reversing in part *Talge Mahogany Co. v. Quinn*, 21 N.P.(N.S.), 221.

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Hamilton County.

HAMILTON, J.

This action was brought in the municipal court by John N. Quinn, doing business as Quinn & Company, against the Talge Mahogany Company, defendant below, to recover the price of what is known as a "Dutch oven" which had been installed in the factory of the defendant at Indianapolis.

As disclosed by the evidence, a "Dutch oven" is an attachment to a furnace under a steam boiler for the purpose of lessening the amount of fuel required, and to increase the steaming capacity of the boiler.

The case was tried to a court and jury and resulted in a verdict in favor of the plaintiff for the amount claimed. A motion for a new trial was overruled, and judgment was rendered upon the verdict.

The Talge Mahogany Company thereupon prosecuted error to the court of common pleas, where the judgment of the municipal court was affirmed. Thereupon this proceeding was brought by the Talge Mahogany Company to reverse the judgment of the court of common pleas and of the municipal court of Cincinnati, and for a new trial.

Plaintiff in error urges three points of error upon which it bases grounds for reversal: first, that the verdict is against the weight of the evidence and contrary to law; second, that the court erred in excluding evidence concerning an express warranty—holding that an express warranty can not exist at the same time as an implied warranty; and, third, that the court erred in its charge to the jury.

Plaintiff below declared upon a written contract or order as set forth in exhibit "A" in the record, which is in the form of a written proposition from Quinn & Company for the furnishing of the equipment at a specified price of \$482 delivered f. o. b. Cincinnati, and in which they agree to furnish a man to install the furnaces, the Talge Mahogany Company to pay him \$5 a day and expenses. This proposition was accepted by the Talge Mahogany Company, and is as of date September 17, 1912.

The defendant by its answer admits that the plaintiff's claim was for the goods, merchandise and services as itemized in plaintiff's bill of particulars, but denies every other fact claimed,

and by way of counter-claim sets up certain representations and statements which it claims constituted guaranties and warranties to the effect that the installation of the "Dutch ovens" would effect a great economy of fuel used under said boilers and would add greatly to the capacity and efficiency of the boilers in said plant, and that said Talge Mahogany Company relying upon such statements, representations, guaranties and warranties so made by the said plaintiff, which they believed to be true, gave the order for the ovens as above stated. The defendant further in its counter-claim stated that said "Dutch ovens" failed in every respect to do the things claimed for them, but instead of effecting a saving in the amount of fuel required, it was necessary and the defendants did use—until the furnace equipments were removed by them—a large quantity of coal and fuel in excess of that required prior to the installation of the furnaces and equipment, and that they were put to great trouble and expense on account thereof, for which they ask damages in the sum of \$875.26; that after making every possible effort to use said furnaces in its plant with economy and efficiency the said defendant was compelled to and did cause same to be removed; and that they lost much time and were compelled to expend a large sum of money on account thereof.

Plaintiff in error contends that the court erred in refusing to permit the defendant below to introduce evidence tending to prove an express warranty, and restricting it to the proof of an implied warranty.

On page 29 of the record, the court says:

"The court will not permit the introduction of evidence tending to prove an express warranty, but it will admit evidence tending to prove an implied warranty," etc.

And, further, the court charged the jury that the inquiry should be limited to the question of whether or not there was an implied warranty in the case.

In this ruling on the introduction of evidence, and in its charge to the jury, the court was in error. Section 8392 of the General Code is as follows:

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“Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller’s opinion only shall be construed as a warranty.”

It is urged by defendant in error that this section does not apply in this case as it would contravene the rule that oral evidence can not be admitted to vary the terms of a written contract.

The language of the statutes is clear and unambiguous. The section defines what shall constitute an express warranty and nowhere limits its application to any special class of contracts. We are therefore of the opinion that Section 8392 applies to the case at bar and the defendant was entitled to put in evidence of an express contract, and to have the consideration of the jury on that question.

Section 8395, sub-section (6) of the General Code, provides:

“An express warranty or condition does not negative a warranty or condition implied under this chapter unless inconsistent therewith.”

Evidence offered by the defendant which in effect tended to show an express warranty was admitted, but was restricted by the court in its application to the purpose of deciding whether or not there was an implied warranty of fitness under all the circumstances of the case. This evidence may have clearly shown an express warranty and being admissible under the statute as above stated should have been admitted for that purpose also, as an express and an implied warranty are not inconsistent in this case.

We are further of the opinion that the verdict and judgment were manifestly against the weight of the evidence. Mr. Talge, president of the defendant company, testified that Mr. Quinn twice before the “Dutch oven” was installed came and examined his plant: that he stated to Talge and represented to him that the company was burning entirely too much fuel and that with

the oven installed it would save twenty to thirty per cent. of the fuel and the boilers would then have sufficient capacity to carry the load required and it would be unnecessary to install another boiler, which had been contemplated by the company, and that the capacity of the boilers would be largely increased. These statements and representations were denied by Mr. Quinn, who was unsupported by any other witnesses. Mr. Talge was supported in his testimony by three witnesses—the engineer, the fireman and the stenographer—who were at that time in the employ of the Talge Company, but who had some time prior to the trial in the municipal court severed their connections therewith and had no interest in the matter so far as the record shows.

Mr. Talge testified that all these statements and representations and affirmations of fact were made to him prior to the ordering of the ovens and induced him to purchase the goods, and that he purchased the goods, relying upon these affirmations, statements and representations.

It appears further from the evidence that the defendant made every effort to use the ovens which had been installed by the man sent by the Quinn Company, and after ten days' trial notified Mr. Quinn that the ovens had been a disappointment and had failed to do the work as represented. Mr. Quinn some time later, after the receipt of this letter, visited the plant, and after looking it over, attributed the failure of the ovens to an opening in a brick wall between the boilers which he claimed interfered with the drafts and further suggested the raising of the stack of the boilers some twenty feet to give the furnaces more draft. The Talge Company was not bound to make these changes, as the conditions were just as they were when Mr. Quinn first visited the plant at Indianapolis and after examination made the representations with reference to the working of the ovens.

These are the salient points in the evidence as shown by the record, and as we view it this evidence did not warrant the verdict and judgment rendered in the municipal court.

For the errors above stated the judgment of the common pleas court and of the municipal court will be reversed and the cause remanded for a new trial.

JONES, P. J., and WILSON, J., concur.

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VALIDITY OF STREET ASSESSMENT.

Court of Appeals for Summit County.

AUGUSTA W. KASCH, FOR HERSELF AND OTHER INTERESTED
PROPERTY OWNERS, v. CITY OF AKRON ET AL.

Decided, November 12, 1918.

*Assessments for Public Improvements—Action to Enjoin Collection of,
Barred When—Character of Work Done Not Open to Attack by
Abutting Owner, When.*

Where the officer or board, designated in a municipal contract as the one to determine whether the terms of the contract have been complied with and the work done in an acceptable manner, has reported that the work has been completed in a satisfactory manner and it is accepted and the final estimate paid, an action can not be thereafter maintained, in the absence of fraud or mistake, by an abutting owner to enjoin collection of assessments remaining unpaid and thereby save such owner and others from further payments toward an improvement which has been declared to be good and substantial.

LAWRENCE, J.

Appeal from the court of common pleas.

This is an action to contest the validity of an assessment levied by the defendant city for the improvement of West Exchange street and Dodge avenue by grading, curbing, paving and constructing sidewalks.

The plaintiff brings the action for herself and other interested owners of property abutting on said street and avenue.

The relief sought is asked upon the sole ground that the work and material for the concrete sidewalk, curb and gutters were not supplied in accordance with the contract therefor, the allegations of plaintiff's petition in that regard being as follows:

“That plaintiff avers for herself and all other abutting lot owners on said portions of said avenue and street interested in like manner with herself that in the construction of the said concrete sidewalks, gutters and curbing, the said contractor

was grossly negligent in permitting the same to become frozen so that the concrete sidewalks, gutters and curbs became broken and cracked in many places on said portion of West Exchange street and Dodge avenue, so that the said contract was not executed as required, and the sidewalk so broken and cracked were of little or no value. Plaintiff repeatedly called the attention of the director of public service of said city and its other officers to the character of this defective work, but the said city failed and neglected to require the said contractor to re-construct said defective work and allowed the contractor estimates for the full contract price which were paid to him regardless of the protests of said plaintiff. Said defective work has never been re-constructed."

The improvement was made in the year 1912, and the assessments therefor were to be paid in ten equal annual installments with the taxes for the years 1911 to 1920, inclusive. Six of said installments were paid before this action was begun, the action having been commenced in the court of common pleas on the 24th day of January, 1918.

Some complaint was made to defendant city in the years 1914 and 1915 relative to the condition of the sidewalk, curb and gutter, and some negotiations between certain property owners and officers of the city of Akron were had relative thereto and some repairs were made thereon.

After the completion of this improvement by the contractor, the city accepted the same, a final estimate was made and paid by the city, less an amount provided in the contract to be retained by the city for a period of two years, all of which amount, except \$400, was after the expiration of two years paid the contractor, said amount of \$400 being sufficient as then determined by the city to repair all defects complained of.

The evidence discloses that some parts of the sidewalk, curb and gutters are not now, six years after the improvement was completed, in a good state of repair, and were not in such repair a year or two after the completion of the work; however, only a comparatively small portion of this improvement is in such condition.

Without going further into the evidence, we are of the opinion that where a municipality enters into a contract for an

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improvement such as this, and by the terms thereof, as in the contract in question, a certain person or official board of the municipality is selected by the parties thereto to determine whether the terms of the contract have been complied with, and the work thereunder properly executed, that when such facts are ascertained and fixed by the person or official board selected, and in the manner provided by the contract, and the work is accepted by the municipality, final estimate made and paid, a suit instituted thereafter to enjoin the collection of the assessments levied to pay the cost and expenses of such improvement can not be maintained on the ground that the work done and material furnished for said improvement were not in accordance with the contract, in the absence of fraud or mistake. No fraud or mistake is alleged or proven herein.

Furthermore, by far the greater part of this improvement is good and substantial; yet the court is asked for an order restraining the collection of all unpaid assessments to the full extent of the improvement. If the prayer of the petition should be granted, the result would be that many property owners would escape paying anything further for work the evidence discloses is good and substantial.

Our attention has been called to the case of *Shook et al v. City of Akron et al*, decided by this court in 1916, and the claim is made that that case should be decisive of the case at bar. With this contention we can not agree. The improvement of the streets in the Shook case, for which assessments were enjoined, was practically of no account at all except possibly the grading thereof, and consequently was not of any benefit to the property assessed, while in the case under consideration, the improvement was of substantial benefit, as above stated, with slight exceptions to the property assessed, and consequently the Shook case can have no controlling effect in the case at bar.

Holding these views, we feel that the relief sought for in plaintiff's petition should be denied, and the petition is dismissed at the cost of the plaintiff.

GRANT, J., and DUNLAP, J., concur.

**WOMAN AUTOMOBILE PASSENGER KILLED BY
TROLLEY CAR.**

Court of Appeals for Cuyahoga County.

WILLIAM G. BAUS, ADMINISTRATOR OF THE ESTATE OF MARY BAUS,
DECEASED, v. THE CLEVELAND, SOUTHWESTERN &
COLUMBUS RAILWAY COMPANY.

Decided, December 9, 1918.

*Negligence—Approach of Interurban Car Concealed by Station Building
—Woman on Back Seat of Automobile Killed—Claim of Contribu-
tory Negligence Withdrawn—Liability of Traction Company Arises
—If Negligence of Motorman United with that of the Chauffeur
Combined to Cause the Accident.*

Where in the trial of an action for the wrongful death of a woman, who was a passenger on the rear seat of an automobile passing over a public crossing, she not being engaged in a joint enterprise with the driver, and who was struck and killed by one of defendant's traction cars, and the charge of contributory negligence has been withdrawn, the defendant will be held liable if its negligence, combined with that of the driver of the automobile, caused the accident; and where there is evidence to support that view of the case, it is reversible error for the court to charge that the jury should simply determine whether the death was caused by the negligence of the driver or by the negligence of the defendant company.

Mathews, Orgill & Maschke, for plaintiff in error.

Tolles, Hogsett, Ginn & Morley, contra.

WASHBURN, J.

Error to the Court of Common Pleas.

Plaintiff sued defendant for damages for wrongful death, and the trial resulted in a verdict and judgment for defendant.

The case is in this court on error proceedings.

The facts as disclosed by the record are, for the most part, undisputed and are as follows:

At the place of the accident, defendant operated an interurban railway on a private right-of-way and across a country high-

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way leading to a summer resort, said highway being used much more extensively in the summer than in winter. At the intersection of the highway and railway, the defendant maintained a building, used as a sub-station and waiting room, which building was located close to the track and close to said highway, which crossed the track at right angles; and said building, together with outbuildings, poles, trees and foliage almost completely obstructed the view of a traveler on the highway, going easterly, of a car approaching the intersection from the north, which car, when two thousand feet away, was in a valley, and came in full view of one close to the track at said intersection when about twelve or thirteen hundred feet distant therefrom.

On the day in question, which was in June, plaintiff's decedent was a passenger in an automobile, she and several other persons in said machine being on their way to the lake on a fishing and picnic expedition. Decedent was in the rear seat and had nothing to do with the operation of the automobile, and no question is made of her being engaged in a joint enterprise with the driver and other occupants of the automobile. As the automobile approached said intersection, it passed along the end of said building and stopped with the front wheels of the auto as close to the track as safety would permit, but said building obstructed the view of the track to the northward of the decedent and others in the rear seat of the auto, except for a short distance.

The testimony is uncontradicted that the occupants of the car looked and listened, and that the driver leaned over the steering wheel and looked north. The testimony is in conflict as to how far down the track the driver could see past the building, but it is apparent that the decedent, after the automobile stopped, could not see the car as well as the motorman could see the front end of the automobile, and it is apparent also that the street car was not where it could be seen by the occupants of the auto before they drew along the side of the building. The auto started ahead and when the rear wheels were in the middle of the track it was hit by a limited car traveling from the north at a speed conceded by the defendant to be thirty-five miles an hour, and claimed by the plaintiff to be at least fifty miles an hour, and the decedent was instantly killed in said collision.

There was a conflict in the testimony as to whether the whistle of the car was blown, but the verdict of the jury compels this court to consider the case on the theory that the whistle was blown when the car was from twelve to fifteen hundred feet away, and again when from one hundred to one hundred and fifty feet from the crossing; but there is no evidence on the subject of the sounding of any gong.

The negligence charged was excessive and reckless rate of speed; neglect to "sound any whistle or gong"; and failure to maintain proper lookout, failure to stop the car and failure to provide guard or flagman or automatic bell at said crossing, and also failure to stop or abate the speed of the car after those in charge of the car knew "or in the exercise of ordinary care ought to have known of the dangerous predicament of the decedent."

The defense was denial of negligence of the defendant and the claimed contributory negligence of decedent.

We find that there was no prejudicial error in the admission or rejection of evidence.

The claimed error which is most strongly argued here arises upon the charge of the court before argument, given at the request of the defendant, and upon the general charge of the court

Plaintiff's decedent was not charged in the answer with being engaged in a joint enterprise and therefore chargeable with the negligence of the driver.

The contributory negligence charged in the answer against the decedent who was riding as the guest of the driver of the auto, although not specified in the answer, was, under the law, her failure to exercise ordinary care for her safety and to reasonably use her faculties of sight and hearing to observe and avoid the dangers incident to crossing such track. *Toledo Railways & Light Co. v. Mayers*, 93 O. S., 304.

Under these circumstances the negligence of the driver was important only in the event the jury should find that the accident was due *solely* to his negligence; and if plaintiff's decedent was not guilty of contributory negligence plaintiff was entitled to recover if defendant was negligent, and the driver's negligence combined with the negligence of the defendant to cause the injury.

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This view of the law is expressed in the general charge of the court near the bottom of page 221 of the record, and before argument and as a part of the general charge also the jury was told that the negligence of the driver could not be imputed to said decedent. But complaint is made that this statement of the law is in conflict with statements of the law contained in special requests given before argument at the request of the defendant, and also with later statements in the general charge of the court. At the request of the defendant, the jury was charged before argument as follows:

“4. I instruct you that as between a person about to cross over an interurban railroad at a crossing, and an interurban car approaching such a crossing, the interurban car has the right of way. This is because a person can stop within a few feet and the car can not.

“5. If you find from the evidence that that obstructions at and about the crossing and the noises of the moving automobile in which Mary Baus was riding were such that she could not without stopping have heard the approach of the car, coming from the direction from which the one with which she was struck came, and that she knew or in the exercise of ordinary care on her part ought to have known that such were the conditions, and if you further find that if she had stopped, looked and listened first before riding onto the tracks of defendant company, she would have heard and seen the car which struck her and avoided the collision; and if you also find that the said Mary Baus, without reasonable excuse therefor, did not stop, look and listen, *but drove onto the tracks without taking this precaution and was killed, then the said Mary Baus was guilty of contributory negligence and the plaintiff can not recover in this action but your verdict should be for the defendant.*”

And in the general charge, the court used this language:

“So the question is, gentlemen, when we come back to that, did the plaintiff exercise ordinary care, or did the defendant exercise ordinary care, or were *they* guilty of want of ordinary care when *they* drove upon that crossing, and if so, was that the proximate cause of the injury to the decedent, the wife of the plaintiff in this action?”

These instructions of the court were given, notwithstanding the fact that all of the testimony was to the effect that the driver

of the automobile stopped the same just before going upon the track, and that he and all the other occupants of the car looked and listened, and we feel that these instructions ignored the position of plaintiff's decedent as a guest in the automobile; charge her with the duties of the driver and visit upon her the consequences of his negligence. In addition to the foregoing the duties of the driver were repeatedly referred to and emphasized in the defendant's requests given before argument and in the general charge of the court, and in such a way as to probably lead the jury to confuse the duties of the decedent with the duties of the driver; and then when the court had finished the general charge, counsel for the defendant withdrew the charge of contributory negligence against the decedent, and the court said to the jury:

"That simplifies it. You are simply to determine, gentlemen, whether it was caused by the negligence of the driver of the automobile, or by the negligence of the railroad company."

This instruction assumes that the accident was due either *solely* to the negligence of the driver, or *solely* to the negligence of the defendant, whereas it might have been caused by the *combined* negligence of the defendant and the driver of the automobile; and in view of all that had been said, the jury may have understood that plaintiff could not recover if the accident was caused by the driver's negligence combined with the negligence of the defendant, and in the light of the facts which are undisputed we are inclined to the opinion that the jury *must* have so understood it.

For the reasons stated, we regard the charge as a whole as misleading, to the prejudice of the plaintiff in error. Judgment reversed and new trial granted.

GRANT, J., and DUNLAP, J., concur.

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**DENIAL TO A COLORED MAN OF EQUAL RESTAURANT
ACCOMMODATIONS.**

Court of Appeals for Summit County.

THE PURITAN LUNCH COMPANY V. LEONARD H. FORMAN.

Decided, November 12, 1918.

Civil Rights—Negro Patron of Public Restaurant—Asked to Eat His Meal in a Room of Inferior Accommodations—Jury Warranted in Concluding the Discrimination Was Based on Race or Color—Leaving the Place Without Eating After Accepting Repayment of Money—Not a Waiver of His Civil Rights by One so Discriminated Against.

1. A requested instruction, made before argument, which applies a principle of law to an incorrect statement of facts, tends to mislead and bewilder the jury and should be refused.
2. Where a negro patron pays for and is served with a meal at a public restaurant and is then requested by an employee thereof to withdraw to a place by himself in a room of inferior accommodation and separate from the white patrons, he may accept repayment of his money and leave the premises without waiving his cause of action against the proprietor, notwithstanding by not remaining he did not ascertain what would have been the result, if any, of his refusal to comply with the request.
3. A back room of a public tavern, where the tavern dishes are washed and its ice stored and in which some dining room chairs have been placed, is not of equal accommodation in all respects to the regular dining room where there are chairs and tables and no dishes are washed or ice stored.
4. Where the reason assigned for requesting said negro patron to eat his meal in the back room was that "the people have been putting up so much kick against it that we are losing a great deal of business," the jury is justified under the circumstances in concluding that the discrimination was based on race or color.

Otis, Beery & Otis, for plaintiff.

Smoyer & Clinedinst, contra.

GRANT, J.

Error to the court of common pleas.

The parties will be designated here as they were in the court below—being in the reverse order of their present standing.

The plaintiff declared as for a violation by the defendant of Sections 12940 and 12941 of the General Code, statutes once called and still commonly known as the civil rights act.

The specific thing aimed at by this enactment is the unlawful discrimination against patrons and customers and guests of taverners and others holding themselves out to the public as performing like functions, based on the prejudices of race, color or previous condition of servitude and not on merit or the want of it.

To make such laws effectual, they are made *quasi*-penal in the consequences denounced upon offenders against them.

The trial was to a jury; there was a verdict for the plaintiff, upon which the judgment called in question here was entered, a motion for a new trial having been overruled.

Three principal grounds of error are alleged and argued in the brief and at the bar. The first involves a question of pleading, and has to do with the granting of a motion by the trial court, made by the plaintiff, to strike from the amended answer certain words.

The words occurred in the third defense, the entire paragraph as it first stood being as follows:

“Further answering, this defendant for its third defense herein adopts all of the allegations and averments of its foregoing first and second defenses, and makes the same a part hereof the same as if again rewritten, and says that it specifically denies that it ever refused to serve plaintiff with food in its restaurant. That on the contrary, it did serve him with the food which he desired to purchase and it says that in refusing to avail himself of the privileges extended to him by the defendant to eat said food in its restaurant and in demanding and receiving money which he had paid as the purchase price of said food, plaintiff voluntarily waived his right to be served with food in said restaurant, and also waived any cause of action he might have had against the defendant herein.”

The words which the court censored out of this answer were the following:

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“* * * And it says that in refusing to avail himself of the privilege extended to him by the defendant to eat said food in its restaurant.”

The material thing to the now complaining party in that paragraph, was to plead as a defense to the action a waiver of its cause by the plaintiff. This defense, this alleged waiver, was sufficiently pleaded by the answer as it was left after the words were stricken out. It was proper certainly, if not necessary, that the facts relied on to establish the waiver should appear in the pleading somewhere. We think they did appear in what had gone before in the answer, and that this was what was referred to when a refusal was alleged by the words eliminated on motion. If they did not appear in the pleading in so many words, the testimony supplied them, abundantly. All the facts tending to prove what was claimed to be a waiver were finally before the jury, and the defense to establish which they were addressed still remained in the answer, intact, ready for the jury to deduce from them the consequence of a surrender by the plaintiff of his cause of action, if the jury should conclude that such consequence flowed from them. So it appears to us that the defendant got, or could have had, had it so urged to the court and jury, the full benefit of the deleted words—even upon the hypothesis that they were properly in the pleading in the first place, which we assume now only *causa argumenti*. It need not, however, be admitted.

Without much question, what the court below saw in the words which made them obnoxious to destructive criticism was the assertion that the plaintiff refused to avail himself of the privileges of the restaurant. It was a conclusion and not a fact. The plaintiff's theory of the case was that when the only choice left to him by the keeper in charge was to eat in a room aparted to inferior uses not shared by white customers, a declining to eat the food was not a refusal to eat it. A refusal requires volition on the part of the refuser. It must be voluntary and not under compulsion, and a requirement or even a request to eat in a room implying the ignominy or humiliation of being herded as a being of an inferior race, might work a

giving back of the food tendered on such conditions, without carrying with it, necessarily, the consequence of a waiver at law. We can see no merit in this assignment of error.

It is next complained that the court below erred in refusing to give in charge to the jury the defendant's requested instructions Nos. 2 and 3, made before argument.

Request No. 2, was in the following language:

"The court says to you as a matter of law that the mere statement made by the employee of the defendant to the plaintiff that the plaintiff would do said employees a favor if he would eat his lunch in the rear room of said restaurant, unaccompanied by any demand expressed or implied, is not sufficient to constitute an unlawful discrimination, and does not make the defendant liable in this case."

An instruction before argument is regarded as giving to the jury the last word as to the law of the case. It must state the law exactly, because it can not be modified or explained or otherwise adapted to the facts by the court, and in that unaided state it is taken by the jury when they retire to consider of their verdict. Of course it can not state the law correctly except in its application to the facts disclosed by the evidence. If, therefore, it assumes as a fact proved that which has not been proved, it contains the double vice of mis-stating the law and misleading the jury. Because it can be good law only so far as the facts to which it refers and is addressed and applied, are good facts—that is, facts in evidence and from which its application arises. This requested instruction is bottomed upon a fact which it assumes but which did not exist. The man in charge of the restaurant and with whom the plaintiff dealt, did not request the latter to go into the back room to eat his meal, as a favor to himself. His own testimony is that if the black man would go out into that room to eat, "he would be doing *us* a great favor." This he repeats in another answer, and still again, all in the same words. This talk was had in the presence of Henderson, the manager, to whom the matter was at once referred by Calhoun, the employee, and by Henderson's direction the plaintiff was given back the money he had paid for his uneaten meal. Beyond all controversy, Calhoun's use of the

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word "us" in this matter was understood both by the plaintiff and himself and also by Henderson, as meaning the proprietor, the restaurant, the concern with which the plaintiff alone was dealing or had any present business. Calhoun was in no shape to be asking favors from a negro, and if he had been taxed with such an unseemly thing, such a low-down thing, then and there—where, as Calhoun says, the guests of the Howe Hotel were accustomed to eat and may have been looking on—if, we say, such a thing as requesting a great favor personally from a black man, had been then imputed to one who was perhaps a lineal descendant of the great South Carolinian, the latter would have resented it hotly.

The request did not state the law because it did not state the facts upon which it was predicated and to which it purported to apply. As it did not state the facts as the jury had them, its tendency, had it been given, would have been to bewilder and mislead the jury in their consideration of the case.

It was, for both reasons, properly refused and there is no error at this point.

Request No. 3—the refusal to give which in charge to the jury is claimed to be error—reads as follows:

"Unless you find from the evidence in this case that what was said to the plaintiff by defendant's employee, together with the facts and circumstances in connection with their conversation, amounted to something more than a request and furnished reasonable ground for the plaintiff to believe that if he did not comply with the request, he would be denied the full enjoyment of the accommodations, advantages, facilities, and privileges of the restaurant, then your verdict must be for the defendant in this case."

We are unable to see how the plaintiff could have tested the soundness of this request otherwise than by standing his ground *vi et armis*, and in that way finding out whether the defendant's servants would follow up their invitation for him to eat where the Howe hotel people would not see him, by force and arms also. It seems clear that the law was not made to invite or encourage breaches of the peace in order to interpret it.

That the request might by suitable additions and modifica-

tions have been made to state the law correctly, is likely true, but is nothing to the purpose, since it was beyond the power of the court to make an incomplete instruction complete and so proper. Had the request been to add its purport and effect to the general charge, the court might have moulded it into a form by which it would have wholly, instead of partly, stated the rule; perhaps it would, in that case, have been the court's duty to do so. But this is not that case; it is a request which, unless it propounds the entire rule of law as to its subject, without comment, addition or subtraction, is nothing and should not, and can not be given.

The point is overruled.

The last charge of error in the record appears in the brief of the complaining party in the following language:

"Third. The verdict and judgment are contrary to the evidence and the law in that defendant in error failed to show an unlawful discrimination which was authorized or was within the scope of the authority of plaintiff in error's servant who dealt with the defendant in error."

We shall not review the evidence in detail. It was for the jury and not us, if—there being a conflict in it—the tendency of it was such as to support that view of it and that result of it which the jury's verdict says is the right view and which for that reason may be held to support and not negative the verdict.

It is our sole business then to see if there was such tendency or not.

The thing to be proved under the statute which is the enabling act of this class of litigation, is a discrimination in service by one holding itself out as a public taverner, and which discrimination must be based in this case on race or color. These qualities are wholly adventitious and accidental; they are not under the control of their possessors, and discriminations on account of them are not founded on merit or the want of it, but spring from prejudice or contempt, undeserved by those upon whom it is visited. Such discriminations are peculiarly galling to their victims. They carry with them a sense of ignominy because they are an injustice which the subject of it can neither resent nor remedy, and they publish him to the world as one who,

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without fault on his part, is to be gibbeted at the cross-roads of public scorn and contumely. The height of this unmerited social outlawry was reached when the Supreme Court of the United States declared judicially that the ostracized race could not be citizens and were regarded when our Constitution was framed as having no rights which a white man was bound to respect.

To correct this judgment of barbarism was the purpose of what is generally known as civil rights legislation, of which the statute being considered is a part. Its history is so well known that more particular reference to it is unnecessary.

This class of legislation has received various interpretations by the courts, varying much with the color line. South of Mason and Dixon's line—where under federal compulsion there are such laws at all—they have received a grudging construction, and even the federal courts, with more acuteness than candor, have gone a long ways towards emasculating them so far as securing the rights meant to be created by them is concerned.

We need attempt no reconciliation of these variant and often grotesquely incongruous holdings. And we may, for the purposes of this case, accept the pro-Southern view as the rule of law applicable. It is, perhaps, as well laid down as anywhere in *Chilton v. St. L. & I. M. Ry. Co.*, 114 Mo., 88. It goes of course only to the extent of the discretion necessary to bring the fact within the denunciations of the statute; the motive inspiring the fact is quite another matter.

That case holds as follows:

“A passenger may not dictate where he will sit, or in which car he will ride. If he is furnished accommodations equal in *all* respects to those furnished other passengers on the same train, he can not complain.”

This rule of requirement does not call for identity of accommodation, but it does mean substantial equality of service, and by that measure of duty we may test the defendant's obligation of service to the plaintiff in this case—the former being admittedly a publican in conducting the restaurant in question.

The evidence material to the determination of both questions—that of equality of accommodation and the motive of the de-

fendant in excluding the plaintiff from the front room of its establishment—may be found in the testimony of Calhoun, the man in immediate charge at the time. So much of this as can be brought to bear upon the real issue of the case, is the following:

“A. I told him he would be doing us a favor if he would eat in the next room. He asked me why.

* * * * *

“Q. Yes. Now, then, after you made this request or when you made this request of Mr. Forman, to carry his food to this room, what did he say, as you recall it? Give the conversation that took place between you, as nearly as you can. A. He asked me what was in that room. I explained to him that there was an electric dishwashing machine in there, an ice box, and chairs provided for them, just the same as they were out in front. Then, he wanted to know why he could not eat out there; wasn't his money as good as anybody else's? I told him it was, but he would be doing us a great favor by going out there. He would not go out there, and we gave him his money, and he went out.

* * * * *

“Q. When this man came up to the counter, Mr. Calhoun, and bought these articles, you sold them to him? A. Yes, sir.

“Q. Took his money? A. Yes, sir.

“Q. Put it in the cash register? A. I did.

“Q. Where did he go? Did he go to one of these enamel-covered, white tables, or to a chair? A. He went to a chair.

“Q. Arm chair, did he? A. Yes, sir.

“Q. What did you do then? A. I went around and told him he would be doing us a favor if he would eat—

“Q. Tell this jury what you said to him. A. I said: ‘You would be doing us a great favor if you would eat your dinner in the rear room, there.’

“Q. What did he say, to that? A. Wanted to know what was the matter with eating out there. I told him, I said the people had been putting so much kick against it, we were losing a great deal of business about that, explained to him, the Howe Hotel were all eating there. I asked him if he would go back there. He said, no, he would not go out there. He said: ‘If you will give me back my money, I will go out.’

“Q. What did you say? A. I said: ‘Shall I give him his money, Mr. Henderson?’ He said ‘Yes.’ I gave him the money.

“Q. What instructions, Mr. Calhoun, did you have, on the

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subject of serving colored people that came in that restaurant?

A. Only that Mr. Henderson instructed me—

* * * * *

“A. —that I should say—ask them, in a manly way, if they would go back there to eat.”

This, we think, sufficiently exhibits the character or quality of the room to which the plaintiff was asked to go to eat the food he had bought and paid for, to put the question to the jury for determination. Upon Calhoun's own showing the jury had a right to find—as by their verdict they *did* find—that the accommodations in the latter room were not identical with those of the front room, that they were not equal, but were inferior. It was a back room; it was the place for washing dishes and for storing ice. The only things it had in common with the other room—the only dining room—were chairs. Upon the whole case, it was not intended to be the equal of the other room; if it had been, there would have been no point in inviting the plaintiff into it and he would not have been so invited; this, in tendency at least, may be gathered from the testimony as a whole. The question remains, was this invitation to the plaintiff to segregate himself into the *quasi*-kitchen while eating his bought meal, purposeful on the part of the defendant? Was it from an intention to discriminate against the plaintiff, not from necessity, but because he was black?

We may be sure that a white man bearing the great name of Calhoun would not be likely to be asking a negro for “a favor,” or “a great favor,” unless some ulterior motive lay behind the request. Unless there was such motive, very different language would have been used, we think. We can think of no such motive, nor can we suppose that the jury could think of any, unless it was the statute, with its apprehended pains and penalties, under which this action was brought. This inference is more than strengthened; it rises nearly to the level of demonstration, when we apply to it what Calhoun said as to the reason of the invitation to the rear room. He says: “I told him, I said the people had been putting so much kick against it, we were losing a great deal of business about that; explained to him the Howe Hotel were all eating there.” That Calhoun, the

factotum, had been instructed to notify black customers that they were of an inferior race by telling them to eat apart from the "man and the brother" of a lighter visage, in "a manly way," is inconclusive as to the compulsory element of the message. Prize fighters call their bruising methods "the manly art," and the newspapers also so characterize it.

Upon no reasonable hypothesis could the guests of the Howe Hotel put up "a kick" against Forman's eating in the front room, unless he was in some way personally offensive to them, and in no way could he personally offend them, consistently with the record, unless he was in some way deemed to be their inferior. He was not personally known to them. How was he inferior? For aught that appears he was cleanly, of good manners and decent demeanor, used no bad language, and it does appear that he had paid for what he got—something that could not be said of all the offended ones, we take no risk in supposing.

No line of cleavage that we can think of remains, except that of color—meaning race.

It is enough that this is the very thing which the statute we are administering denounces and forbids. There is sufficient history behind it—and indeed in its presence—to admonish the courts why and how it became necessary and commended its prohibitions to the law-making power, and to administer it in the light of that history. Its purpose was to contradict the pitiless affront to a being created in the image of a common and impartial Maker, embodied in the rather coarse but still accurate translation which a large and influential section of the country made of Judge Taney's dictum—"A nigger ain't a man." The unthought design, the perhaps unconscious purpose, of this discrimination—and certainly its effect—is to constantly remind the black man that his is an inferior race, whereas our constitutions, our legislation, our avowed public policy, all say it is an equal race in the eye of the law. Historically speaking, of course, our constitutional and legislative declarations and our loud professions of being "the land of the free and the home of the brave," are right. The race over which the shield of the statute extends its protection, is not an inferior race; it is a belated race—made late in the race for

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success by the systematic and legalized robbery for two hundred and forty years of that which alone makes a man ennobled—his right to labor and eat the bread which in the sweat of his own face he has earned.

Insensibly, of course, but not the least less, Calhoun's invitation to Forman to adjourn to the semi-kitchen was to the latter a reminder of the inferiority of his race which many, perhaps most, white men still in opinion maintain, but which the law in this manner and in such places, does not allow, but expressly denies.

It is not for courts to argue for the wisdom of the law they are sworn to administer in its integrity. But there is reason for reminding litigants that the spirit of law should be observed in courts, when elsewhere there is a general disposition to ignore and condemn it.

Assuredly, the newspapers of our cities do not mean to prejudice their readers against those of whom the laws are tender because of their inability to take their own part effectually, but unconsciously they are doing this every day. Whenever a black man is arrested, the fact that he is a black is faithfully recorded. If Pompey is caught shooting *craps*, risking no money but his own, it is always printed "Pompey, a negro." If Bill Smith shoots a *man*, intending to get the latter's money, it is plain "William Smith," if so be his title of "Mister," or "Colonel," or "Judge" is inadvertently omitted.

This is spoken of only to call attention to how many ways there are to remind the under dog that he is under, and that without fault of his own he belongs to a race of under dogs. That he is so regarded by many is nothing to the purpose when it comes to the point that their idea is not to be indulged in places held out as places of public entertainment for which black money is taken indifferently with white money; this is the very thing the law forbids.

It may have been disagreeably reminiscent for some of the white "uncles," guests at hotel, to be served in the same room with men of the exact complexion of the late Daniel Webster or Thomas Corwin, the one a Senator from Massachusetts and the other a Senator of Ohio, but if they are to be catered to in

this respect as well as in that of food and lodging, it must be at the caterer's risk of a lawsuit by the Webster or Corwin, as the case may be. It is commonly thought that Webster got the better of Calhoun in the constitutional argument, when they tried conclusions with each other some years ago.

And that is exactly the kind of lawsuit we have here.

We have no difficulty in finding that in this case there was evidence which justified the jury in concluding there was a discrimination attempted when Calhoun told Forman to eat in the back room; that such discrimination was based alone on Forman's color, evidencing his race; that it was purposeful in its intent; that, therefore, it was an unlawful discrimination, not permitted by the statute, and subjecting Calhoun's principal, the defendant here, to this action.

In so holding we are not departing from our opinion in *Anderson v. State*, determined in Cuyahoga county at our last term.

It follows that there is no error apparent in the record under review and the judgment complained of, doing substantial justice between the parties, is, for those reasons, affirmed.

DUNLAP, J., and LAWRENCE, J., concur.

**NOTICE UNDER A LIABILITY POLICY OF THE OCCURRENCE
OF AN ACCIDENT.**

Court of Appeals for Hamilton County.

THE FISCHER AUTO & SERVICE COMPANY V. GENERAL ACCIDENT
FIRE AND LIFE ASSURANCE CORPORATION, LTD.
OF PERTH, SCOTLAND.

Decided, June 9, 1917.

Indemnity Insurance—Covering a Motor Vehicle—What Constitutes Immediate Notice to the Company—Where Bodily Injuries do Not Develop for Sometime After the Accident.

1. In an insurance policy covering the operation of a motor vehicle, wherein liability is limited to bodily injuries, a provision that "the assured upon the occurrence of an accident shall give im-

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mediate written notice thereof, with the fullest information obtainable at the time, to the corporation's head office in New York City or to its duly authorized agent," does not require the giving of notice to the insurance company of an accident in which the machine covered by the policy was involved but which did not result in bodily injuries; and in an action upon such a policy the use of language in the charge of the court from which the jury might infer that notice to the company was necessary under the policy on the occurrence of any accident whatever, regardless of its resulting in bodily injuries, constitutes prejudicial error.

2. In an action on such a policy, where it did not appear at the time but developed later that bodily injuries were sustained, it is error to refuse to instruct the jury that the giving of written notice of the occurrence of said accident, within a reasonable time after it became known to the assured or his chauffeur that bodily injuries had been sustained, is a sufficient compliance with the stipulation that such notice must be "immediate."

Bettinger, Schmitt & Kreis, for plaintiff in error.

Clore & Clayton, Nelson Schwab and John M. McCaslin, contra.

JONES, P. J.

The parties here stand in the same position in which they stood in the trial court, and for convenience they will be referred to as plaintiff and defendant, the verdict and judgment having been given in favor of the defendant.

The action below was brought upon a policy of insurance by which the defendant agreed to indemnify plaintiff as the assured,

"Against loss by reason of the liability imposed by law upon the assured for damages on account of bodily injuries, including death at any time resulting therefrom, accidentally suffered or alleged to have been suffered while this policy is in force by any person or persons by reason of the ownership, maintenance or use,"

etc., of plaintiff's automobile which was described in the policy.

Suit was brought by Daniel W. Smith for injuries received by him in the collision between plaintiff's said automobile and the one in which Smith was riding. Defendant refused, upon notice, to defend plaintiff in the suit brought by Smith, and denied liability thereunder on the ground that notice had not

been given of the occurrence of the accident in accordance with the terms of the policy.

This action below was brought to recover from defendant the amount of the judgment and expenses in said suit brought by Smith. The insurance policy contained the following condition:

“C. The assured upon the occurrence of an accident shall give immediate written notice thereof, with the fullest information obtainable at the time, to the corporation’s head office at New York City, or to its duly authorized agent. If a claim is made on account of such accident, the assured shall give like notice thereof. If thereafter any suit is brought against the assured to enforce such a claim the assured shall immediately forward to the corporation every summons or other process served on him.”

Defendant denied liability and refused to defend the action brought by Smith, on the ground that plaintiff had wholly failed to comply with said conditions, in that no notice was given as provided in said condition until January 14, 1914, although the accident took place on July 18, 1913.

The record shows that plaintiff’s truck was being operated by a driver who had no knowledge of any bodily injury to either of the occupants of the other automobile, and understood that the extent of the damages caused by the collision was the property damage to the other automobile consisting of a broken lamp and windshield, and the driver made such a report. The first knowledge had by plaintiff of any bodily injury caused by the accident was brought to it by a letter from Smith’s attorney dated December 3, 1913, on receipt of which Mr. Fischer called upon the attorney, and went from his office to the office of the Heister & Huntington Company, the agent for the insurance company, and reported same, and secured from said agent a blank form on which a report was then made to the insurance company.

On December 6, 1913, the attorneys of defendant advised plaintiff of the receipt of this report and stated:

“* * * This is not in compliance with the policy of insurance, which required an immediate report upon any accident that may happen, and for this reason we hereby notify

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you that the General Accident F. & L. Assurance Corporation, Ltd., denies liability for this accident, and declines to make any investigation of the alleged accident, or to defend you in the event an action is brought against you growing out of the injuries to Mr. Smith."

Upon suit being filed by Mr. Smith summons was sent to the agents of the insurance company in compliance with the terms of the policy.

The real question in this case is whether the assured must, under clause C above quoted, give notice of every "accident" that may occur in the use of the automobile insured, or only of such accidents as occasion bodily injuries.

The policy of insurance has nothing to do with injuries to property, but is only concerned with bodily injuries to the person. In this case it appears that Mr. Smith at the time of the occurrence immediately left the scene of the accident without in any way having communicated to plaintiff's driver the fact that he had been injured, and it was not apparent to such driver that any bodily injury had been inflicted. It appears that Smith's injury did not develop to be anything but a trifle until some time after the collision, when it was discovered that a piece of glass from the broken lamp or wind-shield had worked its way into his knee and afterwards occasioned a serious injury.

In the opinion of the court this case is ruled by the principles laid down in *Chapin v. Ocean Accident & Guarantee Corporation*, 96 Neb., 213, the third syllabus of which is as follows:

"In a case where no bodily injury is apparent at the time of the accidental occurrence, and there is no reasonable ground for believing that a claim for damages against the owner of the automobile may arise therefrom, he is not required to give the assurer notice until the subsequent facts as to injury would suggest to a person of ordinary and reasonable prudence that a liability to the injured person might arise. In such case the duty of the assured is performed if he gives notice within a reasonable time after the injury presents an aspect suggestive of a possible claim for damages."

To the same effect are: *Lucas v. Amsterdam Casualty Co.*,

162 N. Y. Supp., 191; *Schambelan v. Pref. Acc'd Ins. Co.*, 62 Pa. Superior Court, 445.

It could well be claimed that if plaintiff's driver had known of even a slight injury to Smith, the stipulation of the policy would require notice of such injury even though plaintiff might deem it unnecessary. Such is the rule laid down in *Travelers Ins. Co. v. Meyers*, 62 O. S., 529.

No doubt it is proper to submit to the jury the questions of fact whether the circumstances of the accident were such as would have made it apparent to the plaintiff that bodily injuries might result from the accident, and whether the terms of the policy as to notice had been complied with. *Crane v. Standard Ins. Co.*, 4 N. P., 309 (affd. 59 O. S., 617). In this view of the law the trial court erred in refusing to give the two following special charges requested by plaintiff before argument to the jury:

"The provision in the policy sued upon, that the assured upon the occurrence of an accident shall give immediate written notice, with the fullest information obtainable at the time, to the corporation's head office at New York City, or to its duly authorized agent, does not require a notice of all accidents, but only such accidents as result in bodily injuries.

"If you find that neither the plaintiff nor the driver of its truck prior to the receipt of the letter from Carl Rankin, on December 4, 1913, knew or had reasonable grounds to believe that Mr. Smith received a bodily injury in the collision on July 18, 1913, and that within a reasonable time thereafter communicated said written notice to the Heister Huntington Company, then I charge you that the giving of that notice was a compliance with the provision of the policy requiring the insured to give immediate written notice of the accident."

And the court erred in its general charge in the use of language from which the jury might infer that a notice was necessary to be given the defendant company under the policy on the occurrence of any accident whatever, even though bodily injury did not result therefrom.

The judgment is therefore reversed and the cause remanded for further proceedings.

GORMAN, J., and HAMILTON, J., concur.

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AUTHORITY OF TRIAL JUDGE TO SUSPEND SENTENCE.

Court of Appeals for Mahoning County.

FREDERIC D. ANTONIO v. T. E. MILLIKEN, AS SHERIFF.

Decided, March 12, 1918.

Courts—Right to Suspend Sentence in Certain Criminal Cases—In Whole or in Part During Term.

In misdemeanor cases the trial court has power under favor of Section 13711, General Code, to suspend, in whole or in part, the execution of a sentence, at any time during the term at which sentence was passed, even though the defendant had entered upon the imprisonment ordered by the sentence.

John Ruffalo, for plaintiff in error.*J. P. Huxley*, Prosecuting Attorney, and *H. H. Hull*, Assistant Prosecuting Attorney, contra.

FARR, J. (orally).

Error to the Court of Common Pleas of Mahoning County.

In February of A. D. 1918, one Antonio was charged in the municipal court of the city of Youngstown, this county, under Section 12428, General Code, with torture. He was found guilty and sentenced by the judge of said court, to pay a fine of twenty-five dollars and the costs of prosecution, and to be imprisoned in the jail of Mahoning county for a period of thirty days, and until his fine and costs were paid.

Antonio was committed to the county jail on the thirteenth day of February, A. D. 1918, and a little later paid said fine of twenty-five dollars and costs of prosecution, whereupon the judge of the municipal court suspended said sentence as to further punishment and issued an order for his release from said jail, which order the sheriff of said county declined to honor or to release plaintiff in error.

An application or petition was filed in the court of common pleas of this county for a writ of habeas corpus. The writ was allowed and duly served. In obedience to the same Antonio was produced in court and upon the hearing the court held that

the judge of the municipal court, having sentenced and committed Antonio to the county jail, and the sheriff having taken charge of him under such sentence, that the court had lost jurisdiction and could not, therefore, suspend or modify the same.

There are two sections of the General Code which relate to suspension of sentence. The first is Section 13706, which provides that certain prisoners may be put upon probation. This is the general section which applies in case of first offenders. The next section, and the one involved here, is 13711, General Code, and provides in part:

“When the sentence of the court or magistrate is that the defendant is imprisoned in a workhouse, jail or other institution, except the penitentiary or reformatory, or that the defendant be fined and committed until such fine be paid, the court or magistrate may suspend the execution of said sentence and place the defendant on probation, and in charge of a probation officer named in such order, in the following manner:”

And then follow paragraphs one and two, which relate to the manner in which a defendant is placed on probation.

As above stated, upon payment of fine and costs by Antonio and two days after he had been committed to the county jail, the judge of the municipal court issued an order directed to the sheriff, which order reads as follows:

“Please release Frederic Antonio sent from this court on the 13th day of February, 1918, on charge of torture, to serve out \$25.00 fine and \$4.00 costs and thirty days.

“This release is made and given after good cause shown to the court that the said Frederick D. Antonio should have his sentence suspended, as provided for in Section 13711, of the General Code, and for the further reason that the court is of the opinion that the said Frederic D. Antonio should be placed upon probation for this crime.

“Witness my hand this 15th day of February, 1918.

“GEORGE H. GESSNER,

“*Judge of the Municipal Court of Youngstown, Ohio.*”

It was this order for release that the sheriff declined to honor or recognize, upon the theory that the municipal court

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had lost jurisdiction of the defendant, and also that the making of such order was the exercise of the pardoning power. It is plainly indicated in this order that it was given under said Section 13711, General Code, so that the only question to be determined here is whether or not the judge of the municipal court had such control over the judgment, as he sought to exercise by the order.

The statute provides that the municipal court of the city of Youngstown shall have four terms of court each year, beginning on the first day of January and continuing for a period of three months each, so that it is clearly disclosed that the charge, sentence, commitment and the order for release, were all made during the first term of said municipal court in this year A. D. 1918; therefore there is no question but that the court sought to modify or suspend the sentence during the term at which the judgment was entered.

A case somewhat in point and of some value here is *Lee v. State of Ohio*, 32 O. S., 113. This is a case where a party was convicted of a misdemeanor and sentenced to pay a fine of ten dollars and the costs of prosecution, but the sentence was not put into execution. Later the party was taken into court on a subsequent charge, and the question arose as to the right of the court to revise the former sentence which had not yet gone into execution, and upon review it was held as follows in the first paragraph of the syllabus:

“Where a court, in passing a sentence for a misdemeanor, has acted under a misapprehension of the facts necessary and proper to be known in fixing the amount of the penalty, it may, in the exercise of judicial discretion and in the furtherance of justice, at the same term, and before the original sentence has gone into operation or any action has been had upon it, revise and increase or diminish such sentence within the limits authorized by law.”

It is urged by the state that this case is scarcely in point for the reason that the sentence had not gone into execution. However, that seems not to have been known by the court which imposed the sentence, as it is disclosed by the facts that the court was not aware that its sentence had not been put into

execution, and the court assumed the right to and did alter or change its former judgment upon the theory that it had originally acted under a misapprehension of the facts.

Johnson, J., in speaking for the court at page 114, observes as follows, and quotes from Lord Coke (Co. Litt. 260a), and it is well known this is a leading authority upon this question, somewhat ancient, indeed, but well in point here:

“It is said by Lord Coke that during the term wherein any judicial act is done, the record remaineth in the breasts of the judges of the court, and in their remembrance, and therefore the roll is alterable during that term, as the judges shall direct; but when that term is past, then the record is in the roll, and admitteth of no alteration, averment or proof to the contrary.”

The foregoing is authority for the view that the court, because the term had not yet passed, had control over its own orders and judgments, and it was held in said case that the court had a right not only to modify but to extend the sentence, and declare that the defendant, instead of paying a fine of ten dollars, should pay one of thirty dollars and costs. Bearing upon the question involved in the foregoing, is the case of *Tracy et al v. State*, 8 C.C.(N.S.), 357, 358; 28 C. D., 454.

Another case of some interest in this connection is *Ammon v. Johnson, Gdn.*, 2 C. D., 149; 3 C. C., 272. This, too, was an application for a writ of habeas corpus. In the eighth paragraph of the syllabus it is held that:

“Where the court has imposed a fine upon the witness refusing to answer, and ordered her to be imprisoned until she answers and pays the fine, it is within the power of the court during the same term of court, and while the action in which she refused to answer is still pending, and after her imprisonment is commenced, to remit the fine and that part of the sentence of imprisonment relating to it.”

It is observed by Baldwin, J., 2 C. D., at page 154, 3 C. C., 272, in which the case of *Lee v. State* is cited with approval in support of the view that a court has control of its judgments during the term, that such right exists as well in criminal as in civil cases, as follows:

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“In none of the cases cited in *Lee v. State*, is any reason given why there should be any difference in the extent of power of the court during the same term over a civil case or one criminal or *quasi-criminal*.”

However, the case of *Webber v. State*, 58 O. S., 616, is practically decisive of the issue here. It is held as follows:

“In a criminal case the court has the power to suspend the execution of the sentence, in whole or in part, unless otherwise provided by statute; and has power to set aside such suspension at any time during the term of court at which sentence was passed. Whether such suspension can be set aside at a subsequent term is not decided.”

In accord with the foregoing case of *Lee, Ex parte*, 3 N.P. (N.S.), 531; 16 O. D., 259.

A case well in point is *Bassett v. United States*, 9 Wallace, 38, in which error was prosecuted to the judgment of the Circuit Court of the Northern District of Ohio, and the fourth paragraph of the syllabus reads as follows:

“It is competent for a court, for good cause, to set aside, at the same term at which it was rendered, a judgment of conviction on confession, though the defendant had entered upon the imprisonment ordered by the sentence.”

In the foregoing, the defendant was charged with a misdemeanor, so that it is especially in point with the case at bar. Another, is *Ex Parte Lange*, 18 Wallace, 163, involving the same question at issue here, and it cites the above case of *Bassett v. United States* in 9 Wallace, 38. In the second paragraph of the syllabus it is held:

“The general principle as asserted as applicable to both civil and criminal cases, that the judgments, orders and decrees of the courts of this country are under their control during the term at which they are made; so that they may be set aside or modified as law and justice may require.”

The reason for the foregoing is obvious; the court passing sentence and entering judgment as in the instant case, should have the power, within a reasonable time, to so alter

the same as to meet the demands of justice; if for any reason, either by mistake or fraud, the court, in passing sentence, acted under a misapprehension of the facts, then the opportunity to exercise sound judicial discretion has been denied and by every principle of right should be exercised by way of revision of sentence to secure the furtherance of justice and the due administration of the law. It was urged that this is a dangerous power; if so, the same may be said of all judicial discretion, and which, if shorn of the right to modify or suspend a judgment within a reasonable time limit, would be much more dangerous. The "time limit" has been held to be the term at which judgment is entered and this for the chief reason, that after term time a record is presumed to have been made of all orders and judgments of the preceding term; that such record is complete, and the term having been adjourned formally or by operation of law, the record imports absolute verity, and is unalterable except as specifically provided by law. The power to revise judgments in such cases during term, as under discussion here, and to correct errors and mistakes, is for the protection of the defendant and the public alike; the principles which support it rest in reason and it comes easily within the spirit of the statute under discussion here.

It will be observed that the judge of the municipal court in issuing said order, states in it "for good cause shown." It was a modification of the original sentence or a suspension of a part of the same, and not the exercise of the pardoning power as urged in argument, because the defendant had complied with a part of the terms of said sentence.

Therefore, for the reasons above given and upon the theory that a court has control over its judgments and orders during the term at which they are made, the judge of the municipal court had a right in the case at bar to direct the release of the prisoner.

The judgment is therefore reversed, and the defendant discharged.

POLLOCK, J., and METCALFE, J., concur.

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**WHEN AN INCOMPETENT WITNESS MAY TESTIFY IN
HIS OWN BEHALF.**

Court of Appeals for Portage County.

IN THE MATTER OF THE ESTATE OF MARY S. ALGER, DECEASED.

Decided, October 1, 1918.

Evidence—Executor Made a Competent Witness for All Purposes—By Being Called by an Exceptor for a Single Purpose—If Testimony Against Interest is Worthy of Credit, that which is Favorable to the Witness Must Also be Received.

If a party in an action, who is prevented from testifying by reason of the provision of Section 11495 of the General Code, is examined as a witness on certain issues in the case by the adverse party under Section 11497, he then becomes a competent witness in the case, and may testify in his own behalf in regard to all the issues in the case.

H. R. Loomis, for exceptor.

S. F. Hanselman and *A. S. Cole*, for executor.

POLLOCK, J.

Donald E. Alger was appointed by the probate court of this county executor of the will of Mary S. Alger, deceased. After he had filed his inventory and appraisement, W. B. Alger, an heir of the estate and interested in the distribution of its assets, filed exceptions to the inventory and appraisement of the executor. The exceptions charged, in substance, that the executor had failed to inventory and appraise a certain indebtedness of his own to the estate. The exceptor asked that the court require an inventory and appraisement of that indebtedness. After the exceptions were heard in the probate court, an appeal was taken to the court of common pleas, and it was again heard upon the testimony, resulting in a judgment against the exceptor.

This action in error is prosecuted to reverse that judgment on two grounds; first, for error in permitting the executor to testify in his own behalf; and, second, that the judgment of the court below is against the weight of the evidence.

We will take these claimed errors in their order. The executor was first called by the exceptor and examined as a witness. He testified on that examination that Mrs. Alger was his mother, and that for many years prior to her death she was living with him; that during that time she had a small tract of real estate which he rented and collected the rent. He says that frequently he retained the rent money, and that she gave him other money; that each time he would give his note therefor, and that after the first time he gave her his note, when he retained any of the rent money or received other money from her it would be added to the amount of the note and a new note given for the total amount. This was continued until about two years prior to her death, when she held his note for about seven hundred dollars. This was as far as the examination on the part of the exceptor went. After the introduction of some other testimony, the exceptor rested.

During the time the executor was offering his testimony he offered himself as a witness, and over the objection of the exceptor was permitted to testify that about two years prior to the time of his mother's death he had a conversation with her in which he claimed that on account of his father, in his lifetime, having collected money which was due witness, this note should be surrendered to him. He testifies that his mother agreed to this arrangement and gave him the note, intending to surrender it and release him from the payment of the amount due thereon, and the note was destroyed.

It is now urged that the court below committed error in permitting the executor to testify in his own behalf.

In this hearing the executor's interest was adverse to that of his estate, and for that reason he was an adverse party under the statute.

Section 11496 of the General Code reads as follows, as far as the question now before us is concerned:

“A party shall not testify when the adverse party is the guardian or trustee of either a deaf and dumb or an insane person, or of a child or a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee of a deceased person.”

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But Section 11497 of the General Code provides:

“At the instance of the adverse party, a party may be examined as if under cross-examination, either orally, or by deposition, like any other witness. * * * The party calling for such examination shall not thereby be concluded but may rebut it by counter-testimony.”

This section gave the exceptor the right to call the executor and examine him as a witness. The executor is the only witness that testifies to this indebtedness or to his release from paying it, so that his testimony was material to both parties in the action.

The Supreme Court of this state had a somewhat similar question before them in the case of *Legg v. Drake*, 1 O. S., 248. In the third paragraph of the syllabus, they say:

“Where a party to an action is called upon and introduced as a witness on the trial, by the adverse party, under the act of March, 1850, to improve the law of evidence, the objection to his competency is waived, and he becomes competent as a witness on the trial for all purposes.”

This act of March, 1850, was, so far as we are able to determine, the first innovation in Ohio on the common law rule that a party in interest in an action could not testify, and in this case they hold that while the party was an incompetent witness in his own behalf, yet by the opposite party calling him, he waived his incompetency, and it was competent to examine him on any issue in the case.

Again, the Supreme Court said:

“A waiver of objection to the competency of a witness so as to allow his deposition to be taken in a case is a waiver during the whole progress of the cause, and the objection can not be insisted on where the witness is called to give a second deposition in the same case.” *Chateau et al v. Thompson et al*, 3 O. S., 424.

These cases recognize the principle that a party can not give credit to the opposite party by calling him as a witness, and then afterwards objecting to his full examination in the case.

When we look to the decisions of the various courts outside of this state, under similar statutes, they seem to be universally in

favor of the proposition that where a witness is incompetent on his own behalf, but may be called by the adverse party, and the adverse party calls such a witness and examines him, he then becomes competent for all issues as a witness in the case.

“If a party puts an incompetent witness on the stand, he makes him competent in the cause for either party.

“Under the Act of March 27th, 1865, allowing a party to call his adversary as a witness, the party if thus called is made a witness for all purposes on his own side.” *Seip v. Storch*, 52 Pa. St., 210.

Sutherland, J., in the opinion in the case of *Fulton Bank v. Stafford*, Second Wendell, 485, said:

“If he is a competent witness to the jury for any purpose, he is so for all purposes, and the party who originally called him and availed himself of his testimony, can not subsequently object to him on the ground of interest any more than he can impeach his general character. He is estopped from denying his competency as well as his credibility.”

The state of Colorado has a statute preventing a party from testifying, where the adverse party is deceased, unless called by the opposite party. In the case of *Warren v. Adams*, found in the 36th Pac., 604, the Supreme Court of that state held that if the plaintiff was examined by the defendant on the question of his insanity, which he alleges as the cause of his delay in bringing suit, that the plaintiff might be cross-examined on his own behalf as to the transaction with defendant's ancestor which is the controlling question in this case.

To the same effect are the following cases: *American Savings Bank v. Harrington's Estate*, 52 N. W., 376; *Boyd v. Conchohocken Worsted Mills*, 24 Atlantic, 287; *Thomas v. Irvin*, 16 S. W., 1048; *Young v. Montgomery*, 67 N. E., 684.

In the latter case, the Supreme Court of Indiana said, in construing their statute, that:

“While Burns' Rev. St. 1901, § 507, provides that in suits by or against heirs or devisees neither party shall be competent witness as to any matter which occurred prior to the death of

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the ancestor, yet where a party exercises the rights given him by Section 510 to call and examine his adversary as a witness, he thereby renders him a competent witness for all purposes.”

The language of the statute which is before the court in the other jurisdictions referred to is somewhat different from our section. The statute under consideration in these cases authorized the calling of the adverse party and his examination as other witnesses, while Section 11467 of the General Code provides that at the instance of the adverse party, a party may be examined as if under cross-examination—that is, the party in asking the questions in his examination need not confine his questions as he is required to do ordinarily on direct examination, but may ask them as is permitted on cross-examination; but it will be noticed that this statute in substance is not any different from the statutes in other states which have been referred to in these several opinions cited. It only gives a different latitude as to the manner of the examination, but in nowise curtails the subject-matter of the examination. The executor in this case could not testify to transactions which occurred between him and his testate unless permitted to do so by the action of the exceptor, which evidence was competent if the exceptor chose to waive the objection to his testifying by reason of the decease of the other party to the transaction, or to make it competent by calling upon the plaintiff to testify. It would be manifestly unfair to permit the exceptor, trusting to the integrity of the executor, to call him and require him to testify to facts concerning the transaction with the deceased which were favorable to the exceptor, and then prevent him from testifying to the entire transaction. A party should not have a right to use the opposite party as a witness so far as his testimony might be favorable to him, and then prevent the witness testifying to matters that would be unfavorable.

We think there was no error in permitting the executor to testify in his own behalf.

Now, as to the judgment being against the weight of the evidence. We do not intend to discuss the testimony. The executor testified to his indebtedness to his mother, and to the surrender

of the note representing that indebtedness for the reason stated by him. This is practically all of the testimony in this case as to his indebtedness to the estate or to the release of that indebtedness.

It would be manifestly unfair for the court to give credit to the testimony of this witness when he testified against his own interest, and then say that when he testified in favor of himself, his testimony was not worthy of credit.

There are no facts in the record tending to impeach his testimony when he says the note was given to him under the circumstances stated.

The judgment of the court below is affirmed.

METCALFE, J., and FARR, J., concur.

NATURE OF TITLE TAKEN UNDER A DEVISE.

Court of Appeals for Fayette County.

CHARLES PERSINGER V. WILLARD BRITTON ET AL.

Decided, November 30, 1918.

Devise—Will Not be Cut Down by Subsequent Clause, When—Limitation on Secondary Contingent Estate—Torrens Registration Act Valid as to Persons in Being Who are Capable of and do Appear and Defend.

1. Where an estate in fee simple is devised in clear and unequivocal terms, such estate will not be cut down or limited by a subsequent clause less conclusive.
2. Where the primary devise in fee simple takes effect upon such devisee arriving at majority and the secondary contingent estate is devised to the children of the first devisee upon his death, the latter estate will be limited to the contingency of the death of the first devisee during his minority and before the fee simple devise becomes effective.

Hidy & Sanderson, for Charles Persinger.

John Logan, for Pha and Jonnie Davis.

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ALLREAD, J.

This action originated in the probate court and was one to register and quiet title, under the provisions of the land registration act. The probate court dismissed the petition for registration as to the real estate in controversy upon the ground that there was an outstanding title in favor of Pha and Jonnie Davis, daughter of John A. Davis, a devisee under the will of Benjamin R. Davis.

From this judgment an appeal was taken by the plaintiff to this court.

The case involves a construction of the following items of the will of Benjamin R. Davis:

“Item 3. I further will and devise one half of said farm to my grandson John Davis (son of my late son James Davis) to be taken possession of by him upon his becoming of the age of majority and then to be held by him and his heirs, in fee simple, upon condition that he pay to his sister Margaret Davis (my granddaughter) the full value in money or property as she may desire, of one half of the share of said farm hereby devised to him.

“Item 6. In case my said grandson John Davis should die before becoming of age or without children, then the half of said farm devised to him shall go to the children of my said son Nelson Davis, to be taken possession of at the same time they get possession of their half of said farm, subject however, to the same condition in regard to the payment to said Margaret as I have hereinbefore stated in regard to said John, and in case said John shall die leaving children then it is my will that his male children inherit his portion of said farm, in preference to his female children.”

The will was executed February 2d, 1862, and was probated February 24th, 1862. John Davis mentioned in items 3 and 6 at the time of the execution and probate of the will was four years of age. He survived the testator and is still living. His estate by successive conveyance has been transferred to the plaintiff Charles Persinger. Pha and Jonnie Davis claim an interest in the estate under item 6 as the only children and representatives of their father John Davis.

Benjamin R. Davis by his will disposed of his 500 acre farm. The general scheme of disposition was that his surviving son Nelson was to have possession and control of the entire farm and support the widow and unmarried daughters until the youngest of his own children and John, the minor son of James, should become of the age of twenty-one years. Subject to the provision for the support of the widow and daughters, one-half the farm was to go to the children of Nelson upon the arrival of age of the youngest. There was no limitation upon the title taken by the children of Nelson after majority.

The other half of the farm was disposed of under items 4 and 6 of the will.

The most significant fact expressed in items 3 and 6 of the will is that John Davis, upon becoming of the age of majority, was to hold the estate devised in fee simple and upon condition that he pay his sister Margaret the full value in money or property of her one-half interest.

No proper construction of the will can be made without a consideration of these as the central provisions of the devise to John.

The testator evidently contemplated that it was probable that his death would occur before John and the other grandchildren would arrive at the age of majority. He evidently did not intend that the grandchild John should take an absolute estate during his minority and, with the possibility in view that John might die during minority and without a representative, made provision for that contingency by creating a contingent remainder or executory devise in favor of the children of Nelson. So far we think the intention of the testator is easily ascertainable. The real difficulty arises in the concluding sentence of item 6 "and in case said John shall die leaving children, then it is my will that his male children inherit his portion of said farm in preference to his female children."

We approach the construction of this item under a well settled rule of construction, stated in the opinion in the case of *Collins v. Collins*, 40 O. S., 364, quoted from the case of *Thornhill v. Hull*, 2 Clark & Finn, 22:

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"It is a rule of the courts, in construing written instruments, that when an interest is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest or estate can not be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving the interest or estate."

The testator here clearly intended to convey a fee simple estate to John upon his arriving at the age of twenty-one years. The estate was then given to him and his heirs in fee simple. These are the most comprehensive terms which a testator can use to confer an absolute and unqualified estate. *McCrea v. McCrea*, 7 App., 351.

Baxter v. Bowyer, 19 O. S., 490; *Johnson v. Johnson*, 51 O. S., 446, and *Robins v. Smith*, 72 O. S., 1, involved terms which imported *prima facie* an absolute estate. They did not involve terms importing clearly and conclusively an intention to grant a fee simple estate in the first taker.

To the comprehensive grant in fee simple is added the effect of the provision requiring John to purchase the half interest of his sister at its full value.

The courts have gone to the extent of holding void a limitation over after a grant of an estate in fee simple. *Hull v. Chisholm*, 7 App., 346; *Tracey v. Blee*, 22 C.C.(N.S.), 33; *Steuer v. Steuer*, 8 C.C.(N.S.), 71; *Widows Home v. Lippardt*, 70 O. S., 261.

It is not necessary to go that far in the present case. The estate devised to John upon his arrival at majority being so clearly one in fee simple, the concluding clause of item 6 must if possible be harmonized and so construed as not to divest the fee simple estate so granted.

Under the will John was not to have the estate in fee simple until he arrived at the age of twenty-one. There were two possible contingencies which might happen in the meantime (1) John might die before arriving at majority without children, and (2), John might die before arriving at majority leaving children. The first contingency was provided for in the con-

tingent devise to the children of Nelson. It is true that the devise to the children of Nelson was contingent upon John's dying during minority or without issue, but we think under the terms employed in items 3 and 6 together with the general scheme of disposition in the will that the word "or" should be read "and" in harmony with the decision in the case of *Ward v. Barrows*, 2 O. S., 242. We think such construction is supported in the present case by a much stronger reason than in the case of *Ward v. Barrows*, because of the clearly expressed intention in the present will to vest an absolute estate in John upon his arriving at majority.

The other contingency which the testator contemplated was John's death before arriving at twenty-one years leaving children, and that contingency was evidently intended to be provided for by the concluding clause of item 6. This construction would harmonize Section 3 and Section 6. It is the only construction which can be given of the latter clause in item 6 which would not be inconsistent with and repugnant to the primary estate granted in item 3. An argument is drawn from the fact that a fee simple estate in John, when he arrives at majority, would change the course of descent from that indicated in item 6. A grant in fee simple imports the right of the grantee to convey the estate to a stranger or permit it to descend under the statute. This is an incident to a fee simple estate and is implied in the devise in fee simple. Under the construction so given John Davis upon his arriving at the age of twenty-one took an absolute fee simple estate with a right to convey the same, and that the plaintiff, Charles Persinger who acquired the estate of John Davis of mesne conveyances, is entitled to have his estate quieted and registered under the act.

It is urged that the registry act is unconstitutional because it may be employed to destroy the estate of a person not in being. Whatever might be the effect of a decree as to a person not *in esse*, we think the statute is valid as to the parties in being and who are capable of and do appear and defend.

Decree accordingly.

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**LIABILITY UNDER A POLICY WHERE THE PREMIUM
WAS OVERDUE.**

. Court of Appeals for Cuyahoga County.

THE COMMERCIAL & ACCIDENT ASSOCIATION OF CLEVELAND V.
VERA L. BAGNELL.*

Decided, July 15, 1918.

Insurance—Provision in a Mutual Benefit Policy for Forfeiture for Non-Payment of Premium Within a Specified Time—Waived by Acceptance of Premiums which Were Overdue—Policy Not Canceled Ipso Facto by Delinquency—Right of Forfeiture Waived, When.

◆ mutual benefit association is estopped from denying liability under a policy which provides for forfeiture if the premiums are not paid within thirty days after certain specified dates, where on several occasions it accepted payments from the insured from two to twenty days after the prescribed time, and had returned for proper endorsement a check for the last premium, which was sent to the association by the wife of the insured two days after it became due, and was received in due course and, without further action, was returned for endorsement on the day before the death of the insured.

Tolles, Hogsett, Ginn & Morley, for plaintiff in error.

Gage, Day, Wilkin & Wachner, contra.

LAWRENCE, J.

This is a proceeding in error to obtain a reversal of the judgment of the Court of Common Pleas of Cuyahoga County, Ohio. The parties stand in the reverse order in which they stood in the court below; we will refer to them in the relation in which they stood in the trial court.

There is no dispute relative to the facts.

At the close of all the evidence, the plaintiff and defendant each moved the trial court for a directed verdict, and the

*Motion for an order directing the Court of Appeals to certify its record in this case overruled by the Supreme Court November 26, 1918.

court directed the jury to return a verdict for plaintiff, which was done and judgment was entered thereon. Motion for new trial was overruled, and error is now prosecuted to this court.

The facts necessary to an understanding of the questions raised here are as follows:

One R. A. Bagnell, who was the husband of plaintiff, in the year 1899, became a member of the defendant association and continued such, as claimed by plaintiff, until his death, which occurred on November 19, 1916. The membership contract of Bagnell provided that his assessments should be due quarterly on January 5, April 5, July 5 and October 5, and payable within thirty days thereafter. The contract of insurance, among other things, provided:

"Any member who fails to pay his assessments, or any of them, within thirty (30) days after notice has been duly served upon him by mail, shall forfeit all benefits as a member of the association, and shall no longer be in good standing; providing, however, that any member having forfeited his benefits as above by failing to pay any assessments within thirty (30) days after notice has been served, or sent him by mail, may be restored to all benefits, he being in good health, by paying all arrearages on or before the next regular monthly meeting of the board of directors.

"Any member who shall have forfeited his benefits under or by virtue of his certificate of membership, shall likewise, and at the same time default occurs, and by virtue thereof, forfeit all right to indemnity and benefits of whatsoever character. Should any delinquent member at any time regain his good standing in the association in the manner above provided, his restoration thereto, shall in no wise operate to entitle him or anyone claiming under him to indemnity or benefits on account of any accident, injury or death received or happened while not in good standing."

Mr. Bagnell paid his quarterly assessments on or before their due dates, except as follows:

The quarterly assessment due January 5, 1911, and payable August 5, 1911, was paid and receipted by the defendant association, August 8, 1911. The quarterly assessment due July 5, 1915, and payable August 5, 1915, was paid by check dated August 11, 1915; received and receipted by the asso-

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ciation, August 13, 1915. The quarterly assessment due April 5, 1916, and payable May 5, 1916, was paid by check dated May 24, 1916; received and receipted by the association, May 25, 1916. The quarterly assessment due July 5, 1916, and payable August 5, 1916, was paid by check dated August 7, 1916, and received and receipted by the association, August 9, 1916.

An attempt was made to pay the quarterly assessment due October 5, 1916, and payable November 5, 1916. Relative thereto, it appears that Mr. Bagnell on November 3, 1916, had his son-in-law, Willard Hall, draw a check for him, payable to his order, in the sum of \$8.90, the amount of the assessment about to become payable. Mr. Hall drew the check, which was dated November 4, 1916, and gave it to Mr. Bagnell. Concerning this check counsel for defendant in his brief says Mr. Bagnell "laid it to one side saying that he would send it with an insurance premium which was then due. On November 7, Mrs. Bagnell discovered that the check had not been mailed, and mailed it to the association without having it endorsed by Mr. Bagnell. The association received the check on November 9, 1916, and on the same day returned it asking that it be properly endorsed. On November 10, Mr. Hall wrote the association advising that Mr. Bagnell had died on the morning of November 10, 1916, and on November 14, upon receipt of the check so returned for endorsement, Mr. Hall again wrote reciting Mr. Bagnell's death and enclosed his own check payable to the association for \$8.90, which check and letter were received by the association on November 16, and returned by the association on that day with the statement that Mr. Bagnell "was at the time of his death delinquent, thereby forfeiting all benefits of the association."

It further appears that all prior delinquent payments were accepted in payment of the respective assessments by the defendant association without making any inquiry as to whether Mr. Bagnell was in good health.

The plaintiff claims and contends that the association's acceptance of the two overdue payments in 1911 and three overdue payments in 1915 and 1916, without objection and without requiring any evidence of Bagnell's health, constituted a waiver

or estoppel of the defendant association's right to enforce a forfeiture on account of the default in the prompt payment of the assessment payable November 5, 1916; and that when the association received the check of Willard Hall payable to the order of Bagnell and returned it for proper endorsement, that constituted an acceptance and thereby became and was a payment of the quarterly assessment due October 5, 1916, and payable November 5, 1916; or, if it did not receive same as payment, by its course of conduct relative thereto it showed intention to maintain the contract of insurance in full force and effect and to waive, as it had previously done, any claim it might have had by reason of the failure of Mr. Bagnell to strictly comply with the terms of the contract.

On behalf of defendant it is claimed and contended, that when Bagnell became delinquent his contract of insurance was *ipso facto* canceled and his rights to benefits ceased without the necessity for any notice or affirmative act on behalf of the association, and that the continued membership of Bagnell in the association after his former delinquencies, up to the date of his last assessment was because the association, under the provisions of its constitution and by-laws reinstated Bagnell in good standing upon his payments of past due assessments, and this being a fact, and the record showing Bagnell to have been in ill health at the time the Hall check was sent to the association, there could be no reinstatement under the terms of the contract of insurance, and Bagnell forfeited his claim to benefit under the contract.

To this contention of defendant, plaintiff says that Bagnell was never suspended from the association or his contract forfeited, and therefore there could be no reinstatement; and that the acceptance by the association of his delinquent payments was a waiver of any right the company might have to forfeit the contract.

To support its claim of forfeiture the defendant cites two Ohio cases: *Insurance Company v. Wilson*, 70 O. S., 354; *Insurance Company v. McMullen*, 24 O. S., 67.

We do not think either of these cases are in point, or support defendant's claim of forfeiture. In the Wilson case the ques-

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tion decided was that a failure to pay a premium when due, there being no waiver of the provision of forfeiture, would terminate the contract of insurance; furthermore in the Wilson case, after the loss occurred, a check, in payment of a delinquent premium, was sent the insurance company. The question in the McMillen case turned on the authority of an agent to waive the forfeiture. The policy of insurance in that case specifically declared that "no agent of the company, except the president and secretary, can exercise such authority," and in this McMillen case the agent who attempted to waive the provision of the contract relative to forfeiture had no such authority, expressed or implied.

In the instant case the real controversy is whether the insurer has waived the forfeiture, or by its course of business with the insured has estopped itself from setting up the forfeiture under the contract.

In the Wilson case, *supra*, the court say:

"As this condition in the policy is made for the protection of the insurer, it could be waived, but there is nothing in this case which tends to show a waiver by the insurance company."

Counsel for defendant say that at the time the former over-due payments were received Bagnell was in good health. This claim seems to be an unsupported assumption rather than a fact, inasmuch as it is no where disclosed by the record.

We are unable to find from the record that there ever has been a breach of this contract of insurance; the defendant association never exercised the provision as to forfeiture, until the receipt of the second Hall check, and we refer to this check as "second" to distinguish it from the unendorsed check the defendant association received and returned for proper endorsement, and we are of the opinion that the purpose of the payments of all over-due assessments by Bagnell was not for reinstatement but for the purpose of complying with his contract of insurance, and were received by the association, not for reinstatement, for the record here discloses he had never been suspended and thereby no reinstatement could take place, but were received by the association for the purpose of discharg-

ing the original obligation. In case of reinstatement some action must be taken. Section 4 of the constitution and by-laws of the association provides that it shall be the duty of the secretary to "report all delinquencies to the board of directors." This was not done, and it confirms the foregoing statement that these over-due quarterly payments were made by Bagnell and received by the association for the purpose of complying with the terms of the contract of insurance and discharging the original obligation, and the association having accepted over-due assessments for these purposes, it thereby waived its right to a forfeiture, and is now estopped to deny the right of the insured to pay the quarterly assessment, payable November 5, 1916, a few days after the time limit provided by its constitution and by-laws. But it is further claimed that Bagnell at the time was not in good health and *ipso facto* was suspended. With this contention we do not agree; the provisions in the contract of insurance concerning the health of the insured relates and applies only to cases where there has been a suspension and thereby a reinstatement became necessary; Bagnell never had been suspended and consequently no reinstatement could take place.

Forfeitures are not favored—they are odious; the law abhors them; and the record does not disclose any conduct on the part of the defendant association consistent with its present stand—an intention to waive is clearly shown.

It is claimed that Bagnell was charged with the knowledge that on November 5, 1916, his benefits were automatically forfeited, and that charged with this knowledge he can not now be heard to say that he intended a thing impossible by the terms of his contract. With this claim we can not agree. The defendant association on two occasions in the year 1911, once in 1915, and twice in 1916, both of these in 1916 being for two quarterly assessments immediately preceding the assessment in question, by accepting overdue payments had in substance said to the insured, Mr. Bagnell, at least by its conduct had led him to believe, that his contract was in full force and effect and that no forfeiture will hereafter be incurred if you continue to pay your assessments within a reasonable time after they

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become payable; and because of this conduct we hold the defendant waived its right to declare a forfeiture of this policy by reason of the failure to pay within thirty days from October 5, 1916.

Moreover, as we understand it, the law is to be administered for the purpose of doing exact and equal justice to all in so far as it may be possible, and can it be said that, under all the facts and circumstances disclosed by the record in this case, it is right, just and fair for this court to now say to the defendant association, it is true you have heretofore by your course of dealing with the plaintiff led him to believe you would not insist upon strict compliance with the terms of his contract of insurance, but now that his beneficiary is about to reap the benefit thereof, you can insist and have a strict interpretation and compliance therewith? In other words, shall this court now do for the defendant association what it did not do and would not do for itself during the life of Bagnell?

There is a great deal of law bearing upon the questions here presented, and it has been cited in the briefs of counsel, and counsel have very fully and ably presented it in oral argument. We can not take the time to review all these authorities; however, those upon which we chiefly rely in arriving at our conclusions and seem most directly in point and sustain our views are the following cases: *O'Conner v. Knights & Ladies of Security*, reported in 158 Northwestern, 761; *Knickerbocker, etc., Insurance Company v. Morton*, 96 U. S., 234; *Swander v. Insurance Company*, 1 C.C.(N.S.), 233; *Insurance Company v. Tullidge*, 39 O. S., 240.

There being no conflict in the evidence, the facts not being controverted, not in dispute, there remained nothing for the trial court to do but apply the law.

We are of the opinion, both upon principle and authority, that the court below did not err in directing the jury at the close of all the testimony to return a verdict for the plaintiff and in entering judgment thereon.

Therefore, the judgment of the court of common pleas will be affirmed.

GRANT, J., and DUNLAP, J., concur.

**LIABILITY OF SHERIFF FOR FAILURE TO LEVY WRIT
OF EXECUTION.**

Court of Appeals for Geauga County.

THE CENTRAL OHIO BUGGY CO. v. W. W. COWIN ET AL.

Decided, September 20, 1918.

*Executions—Deposit of Fees for Service of Foreign Writ—Indorsement
—What is a Sufficient—Sheriff's Failure to Make Levy Renders
Him Liable on Official Bond, When.*

Where a clerk of courts issues a writ of execution in a civil action to another county for service and return by the sheriff of such other county, and indorses on such writ, "Fees on deposit for the service of this writ," and signs his name thereto, such indorsement is a sufficient compliance in that regard with the requirements of Sections 2882 and 12105 of the General Code, and a sheriff's failure to levy an execution in obedience to such writ renders him and his sureties liable to respond in damages for any loss resulting from such failure.

J. T. Carey and R. H. Patchin, for plaintiff in error.

H. O. Bostwick, contra.

FARR, J.

On the 5th day of November, A. D. 1915, the Central Ohio Buggy Company filed its petition in the Court of Common Pleas of Geauga County seeking to recover against W. W. Cowin, sheriff of said county, and the sureties on his official bond as such, for his alleged failure to serve a certain writ of execution against the property of one W. C. Walter of said county.

The petition alleges the election of the sheriff; his giving bond in the sum of five thousand dollars with the sureties named; his assuming and exercising the duties of the office; and the recovery of a judgment in the Court of Common Pleas of Wyandotte County in the sum of \$1,058.96 by the plaintiff in error against the said W. C. Walter on or about the 13th day of August, 1912.

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It further alleges that afterwards, to-wit, on the 24th day of August, 1912, by order of plaintiff, execution on said judgment was duly issued and delivered to Cowin, as sheriff aforesaid, by the Clerk of the Court of Common Pleas of Wyandotte County for levy upon the goods and chattels of said Walter, and that Cowin as sheriff aforesaid failed to make a levy as directed by the writ and on the 12th day of October, 1912, returned the same to the clerk of courts of Wyandotte county with the indorsement thereon, "No property found on which to levy; no money made," and received his fees for the service of the same.

It is further alleged that on the 16th day of September, 1912, W. C. Walter made an assignment for the benefit of his creditors, and that two dividends were paid upon said judgment by the assignee, and a recovery of the balance of the amount of the original judgment against Walter is sought to be made from the sheriff and sureties on his official bond.

A joint answer was filed by the sheriff and his sureties admitting the non-essential allegations of the petition, and admitting the issue of execution and its return as alleged, and averring that the sheriff had refused to levy the execution because there was no indorsement as to the deposit of fees made thereon and subscribed by the clerk as required by statute, and that the plaintiff in error waived its right to recover against the sheriff or his sureties because it had accepted dividends from the assignee; and so the issues were made up.

Upon the trial in the court below, and upon motion at the conclusion of the plaintiff's evidence, the court directed a verdict in favor of the defendants.

The determination of this case involves the issue as to whether or not it was necessary for the clerk of courts of Wyandotte county to indorse upon said writ of execution the exact words relating to the deposit of fees as provided by Section 12105 of the General Code, as follows:

"Funds are deposited to pay the sheriff on this process."

It is claimed, however, that still another section is applicable here, and that is Section 2882 of the General Code, in which it is provided that:

“The clerk shall not issue a writ in a civil action to another county until the party requiring the issuing thereof has deposited with him sufficient funds to pay the officer to whom it is directed for executing it, and the clerk shall endorse thereon the words, ‘Funds deposited to pay for the execution of this writ.’ ”

The foregoing section is quoted in full because it is urged that it is mandatory.

The execution issued by the clerk of Wyandotte county has endorsed upon it, “Fees on deposit to pay for the service of this writ,” Signed, “Daniel Reynolds, Clerk.”

The issue here is, therefore, whether or not the above indorsement was a sufficient compliance with said Sections 12105 and 2882 of the General Code.

It will be observed that it is not in the *exact* language in that regard, prescribed by either of these sections. It is claimed by the plaintiff in error that it was not necessary that it should be, but that any indorsement is sufficient in which the language of the statute is substantially used, and which clearly advises the sheriff that his fees are on deposit with the clerk.

It is contended by the defendants in error that said statutes are mandatory, especially Section 2882, and strict compliance is therefore necessary; while no case has been found which is fully upon the point in the issue raised here, yet there is one somewhat helpful, found in the 10th Ohio at page 45, *Duncan, Sheriff, v. Drakeley*, the syllabus of which is as follows:

“A sheriff can not be amerced for not executing a case from another county, unless the indorsment ‘funds deposited,’ etc., is made upon the writ, nor can a tender of his fees be substituted in the place of such indorsement.”

In the above case there was *no* indorsement upon the writ. The judgment creditors tendered to the sheriff an amount in money sufficient to satisfy him for the execution of it, but it was held that such tender was not sufficient. The court, speaking by Hitchcock, Judge, indicates the purpose of the indorsement at page 50 in the opinion, where it is observed that:

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“In 29 O. L., 226, it is enacted, that it shall be the duty of each and every clerk, where he issues such writ to a sheriff or other officer discharging the duties of sheriff in any other county in this state, to indorse on the back of said writ these words: ‘Funds are deposited to pay the sheriff on this writ,’ and it was required that the clerk should subscribe his name thereto.”

It will be observed that the court did not hold that the words should be indorsed upon the writ in their entirety, but that “Funds deposited” was sufficient, and the reason is declared in the further discussion as to the purpose of the indorsement at the same page, as follows:

“The object of requiring this indorsement is, that the sheriff to whom the writ is directed may have assurance that his fees are secured.” * * *

Such, therefore, is the purpose of the indorsement, and when that purpose is substantially subserved, the requirements of the statute have been met.

It is urged that in the above case it was held that the statute should be strictly construed, but the action was to amerce the sheriff, while in the instant case it is upon the official bond which makes a different issue and the rule of strict construction does not necessarily apply.

It is suggested that the case of *Lumber Co. v. Kennard et al*, 11 C.C.(N.S.), 161, is upon the point and therefore of value in determining the issue here; however, the facts are entirely different, because in the above case there was *no* indorsement on the writ and obviously no action could be maintained against the sheriff for a failure or refusal to execute it; however, it is indicated, inferentially at least, that liability would have attached if the fees had been deposited.

The sheriff went to the home of Walter after he received the writ, and it is claimed that he was then requested not to levy the execution upon the goods and chattels of the judgment debtor for the reason that the judgment would be paid within a short time; the assignment by Walter followed soon afterwards and which precluded a levy, and by reason of which it is said

that the judgment creditor was prevented from recovering in full upon his claims, and for which he seeks to hold the sheriff and sureties on his official bond.

Are the above Sections 2882 and 12105, General Code, in conflict, or in *pari materia*? Obviously they are not in conflict because they relate to the same subject and practically agree, and where one is applicable in a given case the other may be considered so.

To hold strictly to the terms of either, as to the exact words to be indorsed on the writ, would be to annul the other. This the courts uniformly refuse to do, where by any possible reasonable construction such result can be avoided. Mr. Sutherland on Statutory Construction pertinently observes at Section 283, as follows:

“All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes in *pari materia*, are treated prospectively and construed together as though they constituted one act. * * *

“They are all to be compared, harmonized if possible, and, if not susceptible of a construction which will make all of their provisions harmonize, they are made to operate together so far as possible consistently with the evident intent of the latest enactments.”

The wording of said statutes as to the indorsement is not exactly the same, but the purpose of each is identical. That is, to advise the foreign sheriff that his “fees are on deposit” for the service of the writ and the indorsement is his protection as such officer. Therefore, when he is fully advised in that regard, the requirements of the statute, whether directory or mandatory, have been met.

In *Dodge v. Gridley*, 10 Ohio, 174, it is held in the second paragraph of the syllabus that:

“Two statutes in *pari materia* shall stand together, and both have effect if possible, for the law does not favor repeals by implication.”

It is well said in *Annett v. State, ex rel*, 8 L. R. A. (N.S.), 1196, by the Supreme Court of Indiana that:

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“It is a fundamental rule of statutory construction that it is the intent or spirit of an enactment, rather than its letter, which is to govern.”

And another case which is somewhat helpful is *Street Railway Co. v. Pace*, 68 O. S., 206, where the above case of *Dodge v. Gridley* is cited with approval and it is observed as follows:

“Where two affirmative statutes exist, one is not to be construed to repeal the other by implication, unless they can be reconciled by no mode of interpretation.”

Therefore, the conclusion must be that there is no conflict between these sections and being in *pari materia* they must stand together, and such is clearly disclosed by a comparison of the language in each statute with the indorsement on the writ as follows:

Section 2882 provides that the indorsement shall be—

“Funds deposited to pay for the execution of this writ.”

Section 12105 provides—

“Funds are deposited to pay the sheriff on this process.”

And the writ of execution in question here had indorsed upon it:

“Fees on deposit for the service of this writ,”

and signed by Daniel Reynolds, clerk. It was directed to the sheriff of Geauga county. The words of the indorsement are plain, clear and unmistakable; as such they are not susceptible of construction. The sheriff could not be misled. He could not fail to understand that his fees for the service of the writ were on deposit. He could not have known or understood *more* if the exact language of either of the above statutes had been used. He was fully protected by the indorsement, and it was his duty to levy the execution or make the attempt to do so.

Following his failure to execute it, he returned it with the indorsement thereon, “No property found on which to levy; no money made,” signed his name as sheriff and received his fees. In any event the indorsement brought his fees; it was therefore

fully effective for the very purpose for which it was intended. What more was necessary?

When he received the writ he did not make any question about the form or wording of the indorsement, but deemed it quite sufficient to authorize him to go to the home of Walter, no doubt for the purpose of making the levy; his failure to do so, therefore, rendered him liable to the judgment creditor for any loss sustained by reason of such failure; nor does the acceptance of dividends from Walter's assignee now preclude a recovery of the balance, because the payment of such dividends inured to the sheriff's benefit and he can not therefore be heard to complain.

In view of the foregoing, the judgment of the court below is reversed.

POLLOCK, J., and METCALFE, J., concur.

EXCESSIVE DAMAGES.

Court of Appeals for Knox County.

MARION HATHAWAY ET AL. V. H. C. JOHNSON ET AL.

Decided, November 18, 1918.

Verdicts—Will Not be Disturbed Because Excessive, Unless—Charge of Court—Duty of Trial Judge to Separate and Definitely State the Issues of Fact Made in the Pleadings.

A reviewing court will not disturb a verdict because of an award of excessive damages, unless the amount awarded is so disproportionate to the damage shown by the evidence to have been sustained as to convince the court that the jury, in rendering the verdict, was governed by passion, prejudice or feeling rather than by cool, calm judgment.

*J. W. Barry and Burton E. Sapp, for plaintiffs in error.
Robert L. Carr, contra.*

HOUCK, J.

The plaintiffs in error here were the defendants below, where a judgment was entered against them for the sum of \$350,

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based on a verdict returned by a jury for said amount. The issues were raised by petition and answer, the basis of the recovery being for alleged damages done by defendants below to certain trees and fences belonging to the plaintiffs below, the answer being in the nature of a general denial and justification.

A reversal of the judgment entered by the trial judge is asked because he erred in his general charge to the jury, in this, to-wit: that the issues in the case were not defined and stated to the jury.

The rule governing this question is found in the case of *Baltimore & Ohio R. R. Co. v. Lockwood*, as reported in 72 Ohio State, page 586, first syllabus, which reads:

“In submitting a case to the jury, it is the duty of the court to separate and definitely state to the jury, the issues of fact made in the pleadings, accompanied by such instructions as to each issue as the nature of the case may require; and it is also the duty of the court to distinguish between, and call the attention of the jury to, the material allegations of fact which are admitted and those which are denied.”

Applying this rule to the charge in the present case, we find it to be sound in every particular, and in full and complete accord with the rule of law as enunciated by our Supreme Court in the case cited. The language used by the court was plain, explicit, definite and certain, and, as we view it, clearly and concisely stated to the jury each and every fact necessary to be determined, as well as the law governing same. Our examination of the charge further convinces us that the court did its full duty in the premises; and the law, as laid down therein, was responsive to and in complete harmony with the issues raised by the pleadings and the facts as established by the evidence. We have read the pleadings with care, and all the evidence offered in the case, as contained in the nearly two hundred pages of typewritten matter, and we find the issues of fact and law, necessary to a proper solution of the controversy between the parties to this action, were defined and given to the jury by the trial judge as required by law.

The next error complained of is that the verdict is excessive.

As to whether or not a verdict is excessive, in some cases, presents a question not easily to be solved. There are two classes of cases in which an excessive verdict may be set aside, namely: (a) Where the amount of the verdict is clearly susceptible of ascertainment by calculation, or where the law has established some fixed rule by which it may be ascertained; (b) Where no fixed rule is established.

In the first instance there is no difficulty in applying the rule, and where the verdict is excessive, it is the duty of a reviewing court to set aside the judgment entered on such verdict. As to the second, the judgment on the verdict should not be interfered with, unless the amount of it clearly indicates that the jury acted from passion, prejudice, partiality or corruption.

We hold the rule is well settled that in cases like the one at bar the verdict of the jury will not be disturbed, unless in amount it is so excessive as to strike one, at first blush, as unreasonable and outrageous, and such as manifestly indicates that the jury acted under the influence of prejudice or passion, or under a clear misapprehension of its duty and the facts of the case.

In the case of *Brooklyn Street R. R. Co. v. Kelley*, 6 C. R., page 155, Judge Caldwell, speaking for the court says:

“A reviewing court will not disturb a verdict on account of excessive damages, unless the amount awarded is so disproportionate to the damages shown in the evidence that the court is satisfied that the jury, in rendering the verdict, was governed by prejudice, passion, or feeling, instead of by cool and calm judgment.”

This rule of law appeals to us as being sound, and measuring the facts in this case by it, we hold that the second ground of alleged error is not well taken.

Judgment affirmed.

POWELL, J., and SHIELDS, J., concur.

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**AGREEMENTS FOR THE PURCHASE AND SALE OF
REAL ESTATE.**

Court of Appeals for Belmont County.

LEOTA STEEL V. JOHN A. MURPHY ET AL.

Decided, December 11, 1918.

Specific Performance—Will Not be Decreed Unless the Remedy is Mutual—Conditional Acceptance of Offer to Buy or Sell Equivalent to Rejection—Conveyance May be Enforced of an Undivided Interest—Where Co-Tenants Have Refused to Join in Agreement to Sell.

1. An acceptance of a written offer for the sale of real estate must be unconditional in order to become binding upon the party offering to sell.
2. A conditional acceptance, or proposing a different contract, is a rejection of the offer.
3. Courts of equity will not decree specific performance of a written contract for the sale of real estate unless the remedy under the contract is mutual.
4. Where the owner of an undivided interest in land, enters into a contract for the sale of the entire tract, representing that he had authority from his co-tenants to make the sale, he, in his failure to secure a conveyance from his co-tenants of their interest, can not refuse to convey his undivided interest, although the vendee can not be required to accept less than a conveyance of the entire tract.
5. In such a case, a court of equity will at the suit of the vendee against the vendor decree specific performance of the undivided interest of the vendor, with an equitable abatement in the purchase price in proportion to the interest of the co-tenants in said premises.

James C. Tallman, for plaintiff.

Heinlein, Spriggs & James, contra.

POLLOCK, J.

This cause came into this court on appeal and was submitted on the pleadings, the evidence and the arguments of counsel. The only issue before the court arises on the petition of Leota Steel and the answer of the defendant, John Murphy, and reply of plaintiff thereto.

The plaintiff seeks to compel the defendant, John A. Murphy, to convey to her his undivided one-half interest in the real estate described in the petition by virtue of a written contract for the sale of this real estate made by and between the plaintiff and the defendant.

An answer was filed which denied the making of the contract and plaintiff's right to have specific performance.

It appears that on the 28th of February, 1917, Leota Steel went to the home of John Murphy for the purpose of purchasing this lot. At that time she learned that the lot described in the petition was owned by John Murphy and his son, James Murphy. While talking the matter over, John Murphy told her that he would see his son and would let her know in a few days in regard to the sale of the lot. On the 9th of March, following she received a letter enclosing an article of agreement for the sale of this lot. The article of agreement was between John and James Murphy of the first part and Leota Steel of the second part, and provided that the first party agreed to sell lot number 7 in the village of Merrit, Belmont county, Ohio, to Leota Steel for the consideration of sixteen hundred dollars, the purchase money to be applied to the payment of a mortgage held by the Buckeye Building & Loan Company, and the remainder to be paid to these parties. First party to make deed and give possession between the first and tenth of April, 1917. The second party to send first party fifty dollars by return mail and receive a receipt for the amount, stating what it is for. The contract was signed by John Murphy alone.

The defendant first urged that the contract was not accepted by the defendant, or in other words that the parties never entered into the contract. The plaintiff, on receipt of this contract, prepared a contract containing some different terms from the one received—the difference in the two contracts does not appear from the testimony—sending the new contract by mail to John Murphy, enclosing a check for fifty dollars, the cash payment provided for in the first contract.

It is urged that Leota Steel could not retain possession of the contract signed by John Murphy while proposing a different contract, and if he did not accept the one sent by her, bind him

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by accepting his contract. An acceptance of a written offer for the sale of real estate must be unconditional in order to become binding upon the party offering to sell. A conditional acceptance or proposing a different contract is a rejection of the offer. *First National Bank v. Hall*, 101 U. S., 43; *Baker v. Johnson County*, 37 Iowa, 186; *Wheaton Bldg. & Lumber Co. v. City of Boston*, 204 Mass., 218 (90 N. E., 598.)

If the plaintiff, in answer to the defendant's offer, sent a contract containing different terms from that of the offer of the defendant, she could not bind the defendant by accepting his offer without his further consent. But the negotiations in regard to the sale of this property between these two parties did not stop with the receipt by Murphy of the contract prepared by Leota Steel. Murphy collected the check and forwarded to Leota Steel a receipt therefor, reciting that he had received the cash payment on the house and lot at Merrit, near Bellaire, Ohio, enclosing the receipt with a letter stating the reasons why he could not agree to the contract prepared by her.

Some other letters passed from Murphy to Leota Steel before the time of making this deed, and each of them conveys the impression that a contract existed between the parties for the sale of the property.

In the letter which notified Leota Steel that James Murphy would not execute the deed, he does not deny the existence of a contract, but laments the condition he had got himself into. We think that he can not deny that he gave his consent to Leota Steel, to accept the offer made by him after he had refused her proposition and can not now deny the existence of this contract between them for the sale of these premises.

After the refusal of James Murphy to perform the conditions of the contract by conveying his interest in the property to the plaintiff, she instituted this action against John Murphy to enforce specific performance of the undivided one-half interest in this property owned by him. It is urged that she can not maintain this action for the reason that the remedy of specific performance is not mutual to the parties, and that specific performance is never enforced unless the contract and remedy is mutual; that a court of equity could not decree specific perform-

ance of the undivided half of the property in favor of John Murphy for the reason that the contract provided for the sale of the entire interest, and that if he could not maintain specific performance, the plaintiff can not maintain it.

In order to enforce specific performance of a written contract for the sale of real estate the remedy must be mutual.

“Courts of equity will never decree performance when the remedy is not mutual or one party only is bound by the agreement.” *Parkhurst v. Van Cortland*, 1st Johnson’s Chancery, 282.

This principle was recognized by the Supreme Court of this state in *Hutcheson v. Heirs of McNutt*, 1st Ohio, 14-20.

But the remedy on the contract as made was mutual. The defendant, John Murphy, if he had been able to produce a deed for the entire property, could have enforced specific performance against the plaintiff had she refused to accept the property; but the question in this case does not depend upon the principle of mutuality of the remedy on the contract, for that existed, but it depends upon the principle of whether, when the title of the vendor to part of the property fails, the vendee can elect to enforce specific performance of the part to which the vendor has title. If the vendor, at the time he entered into the contract for the sale of land to which he has title only to an undivided interest, represented that he had authority from the other tenants in common to sell the entire estate, and the vendee, relying on that representation, contracted to purchase the entire premises and if the vendor afterwards fails to secure a conveyance from his co-tenants, the vendee may enforce specific performance of the interest owned by the vendor. This principle is recognized in *Cochran v. Blout*, 161 U. S., page 350.

A court of equity will not permit the vendor to take advantage of his own wrong or mistake, but upon the election of the vendee will decree specific performance of the undivided interest owned by the vendor with an equitable abatement in the purchase price in proportion to the interest not owned by him.

Story’s Equity Jurisprudence, Section 779, uses the following language in announcing the principle:

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“We have thus far principally spoken of cases of suits by the vendor against the purchaser for a specific performance, where the contract has not been, or can not be, strictly complied with. But suits may also be brought by the purchaser for a specific performance under similar circumstances where the vendor is incapable of making a complete title to all the property sold, or where there has been a substantial misdescription of it in important particulars; or where the terms, as to the time and manner of execution, have not been punctually or reasonably complied with on the part of the vendor. In these and the like cases, as it would be unjust to allow the vendor to take advantage of his own wrong, or default, or misdescription, courts of equity allow the purchaser an election to proceed with the purchase *pro tanto*, or to abandon it altogether.”

See also *Morss v. Elmendorf*, 11 Page's Chanc., 277; *United States v. City of Alexander*, 19 Federal, 609; *Jones v. Shackelford*, 5 Ky., 410; *Lillery v. Land*, 136 N. C., 537 (48 S. E., 824); *Quary v. Scher*, 136 Cal., 406 (69 Pac., 96).

We think from the facts developed by the testimony in this case, that the defendant, John Murphy, represented to the plaintiff, Leota Steel, for the purpose of making this sale, that he had authority from James to sell his interest, and that he was disposing of it in the contract with her. When she visited Murphy on the 28th of February, in regard to the purchase of this property, she claims that he told her in substance that while he had authority to dispose of James' interest, yet that he preferred to wait until he consulted with James, and that after that he would write her. It is true he does not admit this conversation, but we think that the probabilities are the conversation took place, and then on the 9th of March when he sent the contract he also enclosed with it a letter containing the following:

“We have come to an understanding that you can have the property, so if you mean business I will write a little contract and sign it and you can send me \$50 to bind the contract, and James and I will make the deed between the first of April and the 10th.”

We think that John Murphy represented to the plaintiff, Leota Steel, that he had authority to sell this entire property

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and can not now refuse on the ground that James will not convey, to specifically perform the contract so far as he has title to the property.

The decree may be drawn in favor of the plaintiff.

METCALFE, J., and FARR, J., concur.

RIGHT OF SURETY ON A NOTE TO PLEAD A SET-OFF.

Court of Appeals for Ashtabula County.

LAURA C. GODDARD v. M. POLLOCK.

Decided, September 11, 1918.

Surety—On a Promissory Note—May Plead Indebtedness of Holder as a Set-Off, When—Construction of Sections 8224 and 8296 of the Negotiable Instruments Act.

In an action on a promissory note against two defendants both of whom are "primarily liable" on the instrument, but one of whom is in fact a surety, it is competent for the surety to plead as a set off an indebtedness existing in favor of the principal debtor against the holder of the note.

C. S. Ford, for plaintiff in error.

John Copp, contra.

METCALFE, J.

The defendant in error, M. Pollock, brought this action to recover of the plaintiff in error upon a promissory note executed January 15, 1917.

The defendant, Laura Goddard, filed an answer in which she avers that she signed the note without any consideration and as surety only, and she then pleads as a set-off an indebtedness in favor of the defendant, Jay C. Goddard, against Pollock, the plaintiff and holder of the note.

A demurrer was filed to the answer, which was sustained by the court of common pleas, and the parties not desiring to further plead judgment was entered in favor of the plaintiff on this note.

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The question here is: Can the defendant, Laura Goddard, plead the fact of her suretyship and the existence of a set-off in favor of the principal debtor, against the holder of the note? The solution of this question depends upon the construction to be given to Sections 8224 and 8296, General Code, which are included in what is known as "the negotiable instruments act."

In the first place it is urged that by the act of signing her name upon the face of the instrument Laura C. Goddard became primarily liable on the note, and we think this contention is correct. Section 8296 provides:

"The person 'primarily liable' on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily liable.'"

The note in suit is an absolute unconditional promise to pay, and both the parties are, by the terms of the instrument, absolutely required to pay it and hence it follows that they are both primarily liable; but, we do not think that that fact determines the question, whether or not she may plead a set-off existing in favor of the principal debtor. The fact that he is principal debtor and she is surety is admitted by the demurrer, but the question whether she is principal or surety does not affect the question of primary liability.

It is further claimed that by the terms of Section 8224 that Mrs. Goddard could not plead the fact that she was a surety on the note, nor plead a set-off existing in favor of the principal debtor, and that the discharge of the note could not be effected by offsetting an indebtedness in favor of the principal debtor. Section 8224 provides:

"A negotiable instrument is discharged:

"1. By payment in due course by or on behalf of the principal debtor.

"2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.

"3. By the intentional cancellation of the same by the holder.

"4. By any other act which will discharge a simple contract for the payment of money.

"5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

This section distinctly recognizes the fact that there may be a principal debtor, and if there is a principal debtor there must also be a debtor who is not a principal debtor. If the debtor who is not the principal debtor is a surety, that fact can only be ascertained judicially by pleading it. It would certainly be competent for the surety to plead any of the things mentioned in the section and to plead them for his own benefit.

We think the controlling part of this section, so far as this case is concerned, is Sub-division IV:

“By any other act which will discharge a simple contract for the payment of money.”

The judicial determination of the fact that the maker of the note is the owner of a claim against the holder, which may be legally offset against the plaintiff's claim, is an act which will discharge the contract for the payment of money. We see nothing in this section which takes away from the debtor on a promissory note any right of set-off which existed before the passage of “the negotiable instruments act,” and the right of the surety having existed before the passage of the act to plead a set-off is not taken away by that act.

It is urged that the case of *Richards v. Market Exchange Banking Co.*, 81 O. S., 348, determines the question adversely to this holding. We were inclined to think so at first, but a study of that case leads us to the conclusion that the two cases are easily distinguishable. The first proposition in the syllabus of *Richards v. Banking Co.* is:

“One who signs a promissory note on the face thereof, and who in that way becomes a surety for the principal maker is by force of Section 3178a, Revised Statutes, primarily liable for the payment of such note.”

Section 3178a, Revised Statutes, is now Section 8296, General Code. The second proposition of the syllabus reads:

“Sec. 3185j, Rev. Stat. (Sec. 8224, G. C.), relating to the discharge of negotiable instruments provides in what manner and for what causes such instruments may be discharged, and by force of the rule *expressio unius est exclusio alterius* sureties

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upon such instruments who are primarily liable thereon can not be otherwise relieved from responsibility for their payment."

That is to say, that the surety upon a promissory note who is primarily liable thereon can only be relieved from its payment by force of the language of Section 8224.

The question which was before the court in the latter cause for determination was whether or not a contract made by the principal debtor with the holder of the note for an extension of time of payment to a particular time discharged the surety. That was undoubtedly the rule before the passage of Section 8224.

The Supreme Court held that such a contract is not within the provision of the statute, and therefore that the rule that a contract to extend the payment of the note for a definite period would relieve the surety, is no longer in force in Ohio.

In that case they were seeking by an act of the parties not comprehended in the language of the statute to discharge the contract in question, and the court held it could no longer be done that way; but we think that the language of Sub-division IV before cited, saves the right to defendant to plead a set-off. To hold otherwise would be to say that the Legislature intended to take away from the maker of a promissory note the right to plead an indebtedness existing in his favor against the holder of the note. We do not think that was the intention of the statute.

It is claimed, also, that the language of the note itself precludes the defendant from pleading a set-off or counterclaim.

To put upon the language of the note the construction claimed for it by the defendant in error, would be to say that the defendant below has given up her right to plead counterclaim or set-off without consideration, and that it was in fact a guaranty that they had no such claim.

We do not think the language bears that construction, and if it did it would certainly be doubtful whether a party could give away without consideration their right to set up a legal defense in an action upon a promissory note. We think the demurrer in this case should have been overruled and the judgment of the common pleas court in sustaining it is reversed.

POLLOCK, J., and FARR, J., concur.

LIABILITY OF SURETY FOR SUPPLIES USED BY CONTRACTOR.

Court of Appeals for Franklin County.

STATE OF OHIO, ON RELATION OF THE HILANE GARAGE &
MACHINE COMPANY, v. THE UNITED STATES
FIDELITY & GUARANTY COMPANY.

Decided, November, 1918.

*Sureties—Bond Covering Road Contract—Gasoline and Oil Part of
the Material Used—Grain and Feed Cases Distinguished.*

A surety upon the bond of a contractor for road improvement given under Section 1208, General Code (106 O. L., 634), is liable for gasoline and oil furnished the contractor for use in motor trucks engaged in transporting material for the construction of the road under the contract.

Watson, Stouffer, Davis & Gearhart, for plaintiff in error.
Atkinson & Smith, contra.

ALLREAD, J.

This action was brought to recover for gasoline and oil supplied to the trucks of Culbertson & Culbertson, contractors, for certain road construction work. The trucks were engaged in hauling sand and gravel to be used in the work of constructing the road. The gasoline and oil was furnished by the plaintiff under a contract with Culbertson & Culbertson. The defendant, the United States Fidelity & Guaranty Company, was the surety upon the bond of Culbertson & Culbertson for the performance of the contract.

The statute (Section 1208, G. C., 106 O. L., 634) requiring the bond, contains the following provision:

“Such bond shall also be conditioned for the payment of all material and labor furnished for or used in the construction of the road for which such contract is made, and which is furnished to the original contractor or sub-contractor, agent or superintendent of either engaged in such work. The bond may be enforced against the person, persons or company executing such bond by any claimant for labor or material.”

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The bond among other provisions contains the following:

“And shall pay all claims of sub-contractors, materials, men and laborers arising from the construction of said improvement.”

The contentions of counsel for defendant in error is that the furnishing of gasoline and oil to motor trucks engaged in the hauling of material for the construction of the road in controversy is not “material and labor furnished for or used in the construction of the road.”

The trial court accepted this view and instructed a verdict for the defendant.

Counsel upon both sides have been industrious in the citation of many cases under similar statutes and contracts. The case at bar involves a construction of the statute and bond above recited.

It is argued in behalf of the contention of the defendant in error that the material and labor for which the personal liability is given against the surety upon the bond of the contractor must be limited to the labor and material going directly into the improvement.

While there are some cases notably the case of *City of Philadelphia v. Malone*, 214 Penn. State, 90, which accepts that restricted view yet we think the weight of authority sustains a more liberal construction of the statute and bond under consideration. *Title Guaranty & Trust Co. v. Crane Co.*, 219 U. S., 24; *City Trust, etc., Co. v. U. S.*, 147 Fed., 155; *Zipp v. Fidelity & Deposit Co.*, 76 N. Y. Supp., 386; *Am. Surety Co. v. Lawrenceville Cement Co.*, 110 Fed., 717; *National Surety Co. v. U. S.*, 228 Fed., 577; *Brogan v. Natl. Surety Co.*, 246 U. S., 257; *U. S. Fidelity Co. v. Bartlett*, 231 U. S., 237.

It will be observed that the statute includes not only material and labor used “in” the construction of the road, but material and labor furnished “for” the construction of the road. We think that to confine this construction to labor and material which goes directly into the road improvement would be too narrow. Motor trucks are very commonly used in modern road construction. The language employed in the statute would

include any labor or material furnished the contractor or subcontractor which goes directly into and forms a part of the work or road construction. Gasoline and oil in motor car service are essentials and without it trucks could not be operated. It is identical in principle to the coal and oil cases where coal and oil are furnished to operate the engine and the engine takes the place of labor in the construction.

In the coal and oil cases the claims were allowed because the coal and oil furnished the motive power and operated as a substitute for labor. The same argument may be made in favor of gasoline and oil as applied to motor truck transportation.

If the material is only a few feet from the desired position in the road it could be shoveled by labor. If it were a few yards away it would probably be wheeled by labor, but if miles away it may be transported by motor trucks with gasoline and oil as the motive power. So that, if the argument that the gasoline and oil must be a substitute for labor is necessary to support the plaintiff's claim, the argument would not be entirely lacking as the distance required for transportation would not change the principle.

It is true it has been held that grain and feed for the sustenance of animals employed in transportation and other work is not material within the meaning of statutes and contracts. *U. S. v. Laurence*, 236 Fed., 1006; *National Surety Company v. U. S.*, 228 Fed., 577; *Pennsylvania Railroad Company v. Mahaffey*, 75 O. S., 432.

But the grain and feed cases do not purport to be inconsistent with the coal cases. In fact in the *National Surety Company* case the court allowed a claim for coal and disallowed a claim for feed. It is apparent that claims for feed for animals or men engaged in labor upon construction work are more remote than claims for coal or gasoline and oil used as the motive power for machinery directly employed in construction work. The feed and grain cases are not, therefore, irreconcilable with a claim for gasoline and oil under the circumstances of the present case.

We are, therefore, of opinion that the plaintiff would be entitled to an allowance of his claim for gasoline and oil

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furnished to the contractor for use in trucks employed exclusively in conveying material for use in the road improvement contracted for.

Judgment reversed and cause remanded for a new trial.

KUNKEL, J., and FERNEDING, J., concur.

**WILL CONSTRUED TO HAVE CREATED TWO CLASSES
OF HEIRS.**

Court of Appeals for Wood County.

JOHN A. STEARNS ET AL V. JAMES F. BRANDEBERRY ET AL.

Decided, June 17, 1918.

Wills—Provision that Remainder of Estate Go to the Heirs of Testator and His Wife—To be Divided Equally Share and Share.

A testator after making certain specific bequests and devising a life estate in the remainder of his property to his wife, provided in his will as follows: "It is my request that the balance of my estate be equally divided between my living heirs and the living heirs of my wife, Sarah Ann Stearns, share and share alike."

Held: That two classes are created by the words "my heirs and the heirs of my wife Sarah," and that the testator's heirs, who were two brothers and a sister, would take one-half of the estate, and the heirs of his wife, who were four brothers and two sisters and two nephews, the sons of a deceased sister, would take the other half.

Held, further, that the phrase "share and share alike," qualifies the provision for each set of heirs and that the distribution among each set of heirs of the half so devised, is to be as of the date of the death of the widow, and to be *per capita* and not *per stirpes*.

Fries & Hatfield, for plaintiffs.

Reed & Maurer and *Wade & Dillon*, contra.

RICHARDS, J.

This action was brought by the plaintiffs as executors of the last will and testament of Orrin Stearns to obtain a construction thereof by the court. The will was executed on October 17, 1888,

and after making certain specific bequests and devises, gives and devises to his wife, Sarah Ann Stearns, all the remainder of his property, real and personal, for and during her natural life.

The will then contains the clause which is in controversy and which reads as follows:

“It is my request that the balance of my estate be equally divided between my living heirs and the living heirs of my wife, Sarah Ann Stearns, share and share alike.”

In view of the fact that the wife was given a life estate in all the property remaining after the specific provisions were satisfied, the time of distribution would naturally be the date of the wife's death; and the living beneficiaries referred to in the clause above quoted would be those who were living at that date. At the time of the execution of his will and at the time of the death of his wife, Sarah Ann Stearns, the heirs of the testator were two brothers and one sister who are named in the will and are parties to this action, and at the date of the wife's death her heirs were four brothers and two sisters and two nephews, the sons of a deceased sister.

Counsel for the heirs of the testator claim that those heirs are entitled, under the provisions of the will quoted, to one-half of the estate remaining, while counsel for the heirs of the widow contend that both sets of heirs are grouped as one and that each heir is entitled to an equal part of the estate, no matter whether such heir be an heir of the testator or an heir of his widow. The common pleas court held with the contention made on behalf of the heirs of the testator, and awarded to said heirs one-half of the estate, construing the will to be such that the remaining one-half would pass to the heirs of the widow. In the course of the opinion of the trial judge, which has been submitted to us, he uses the following language which we think clearly states the proper construction to be placed upon the will:

“Two classes are created by the provision, ‘my heirs and the heirs of my wife Sarah.’ And the phrase ‘equally divided between’ means an equal division between the two classes. And the phrase ‘share and share alike’ qualifies the provision for each set. This construction gives each word its generally accepted meaning, eliminates none as surplusage and makes the provision a consistent whole.”

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A fair construction of the clause in question in the will leads to the conclusion that the testator was intending to divide the property so that his heirs should receive as much as the heirs of his wife. It was his property that was being disposed of, and we could hardly conclude that he intended by the language used to give to each one of his wife's nephews an equal share of his property with his own brothers and sisters; neither could we assent to substituting the word "among" for the word "between" when the testator has evidently used the word "between" accurately and expressed his intention and indicated that his heirs and his wife's heirs constituted two classes.

In *Bassett v. Granger*, 100 Mass., 348, the bequest reads:

"I give and bequeath all my personal property of every name and nature, after paying the foregoing legacies, to the heirs of my late husband and to my heirs equally."

This language was construed by the Supreme Judicial Court of Massachusetts to be a bequest in equal shares to two classes.

A similar conclusion was reached in *Records v. Fields*, 155 Mo., 314, where the provision was that the property should be "equally divided between the heirs of William Fields and James Fields, deceased."

See also *Young's Appeals*, 83 Pa. St., 59. In the course of the opinion in the case just cited the court uses the following language:

"He and his wife were childless. There was no issue of either to whom the property could be transmitted. It may have been the joint product of their industry and economy. This or some other moving cause prompted him to direct that the property be 'equally divided' between families of different blood. The language clearly points to one general division, one separation of the fund. Two classes were in his mind. One class was his relations, the other class was his wife's relations. The property was to be equally divided 'between' these two classes, and each class to take one-half. His relations one-half, his wife's relations the other half. Neither the language nor the spirit of the will indicates that each relation should have an equal share."

The conclusion indicated is not in conflict with the decision of this court in *Holmes, Exr., v. Fackleman*, 2 Ohio App. Reports, 258; 20 C.C.(N.S.), 109.

In that case the testator devised the remainder of his property to the children of his two sisters, Margaret Fackleman and Marion Fackleman, to be equally divided between them, share and share alike. At the time of the execution of his will both of his sisters were deceased, one having nine children living and the other four. The language of the will did not create two classes as in the case at bar, and in view of the fact that both his sisters were deceased and all of their children were of the same relationship to the testator, a fair interpretation of the will was that the remainder of the estate should be divided into thirteen equal parts, one part going to each of the thirteen grandchildren.

In the case at bar, the heirs of the widow were at her death four brothers and two sisters and two nephews, sons of a deceased sister, making eight in all. The distribution is to be made as of the date of the death of Sarah Ann Stearns, widow of the testator who had a life estate, and each of her heirs then living would be entitled to one undivided eighth of the half of the estate which passed by the terms of the will to her heirs. This branch of the case falls directly within the holding of *Mooney, Guardian, v. Purpus, Exr., et al.*, 70 O. S., 57, and the distribution to the heirs of the widow must, therefore, be *per capita*, and not *per stirpes*.

The fact that Jane Werner, one of her sisters, died subsequent to the widow's death leaving children would not alter the method of construing the will for the estate vested at the death of the widow and Jane Werner took at the date of the death of her sister one-sixteenth of the estate.

It follows from what has been said that each of the three heirs of the testator is entitled to one undivided sixth part of the estate and each of the eight heirs of the testator's widow is entitled to one-sixteenth part of the estate. All of the assets of the estate have been collected and converted into money and the executors have paid all the debts of the estate and there now remains in their hands as executors the sum of \$16,252.59. A decree may be entered ordering the distribution of that amount in accordance with this opinion.

CHITTENDEN, J., and KINKADE, J., concur.

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**DETERMINATION AS TO WHO DIED FIRST IN A
COMMON DISASTER.**

Court of Appeals for Cuyahoga County.

LIBERTY B. WARE, EXECUTOR, v. JOSEPH KINCH ET AL.

Decided, January, 1919.

Victims of the Sinking of the Lusitana—Descent of Property Dependent on the Order of Death—No Presumption Arises in Such a Case—Burden of Proof Upon the Party Dependent on Survivorship—Degree of Proof Necessary for Finding—All a Question of Evidence.

1. Where in an action involving a determination as to which died first of two persons who perished in a common disaster at sea, the issue must rest on the evidence unaided by any presumption. If the evidence fails to establish a probability of survivorship, the party having the burden fails. Conflicting evidence necessitates a higher degree of proof than meagerness of evidence, but such as it is the evidence must give rise to something more than mere conjecture and rise to a degree of probability which will enable a fair minded man to come to a conclusion.
2. Where the question as to which outlived the other lies between a mother and her son, and the evidence is to the effect that the mother was last seen in her state room of the sinking ship, and a few moments later the son was seen on the upper deck after the part of the vessel in which the mother's room was located had sunk beneath the water, and there is no further testimony and no conflict, a court will conclude that the son outlived the mother and took under her will.

L. B. Ware, for plaintiff.

D. M. Bader, contra.

WASHBURN, J.

Appeal from the Court of Common Pleas.

Mrs. Eunice Kinch, in contemplation of a trip to England, executed her will on April 29th, 1915, and, together with her son, William Mustoe Kinch, sailed on the Lusitania from New York about May 1st, 1915.

The Lusitania, while off the coast of Ireland, was torpedoed by a German submarine on May 7th, 1915, at a little after two o'clock P. M., and sank in about twenty minutes, and both Mrs. Kinch and her son perished in the disaster.

By the will of Mrs. Kinch she bequeathed five thousand dollars to Liberty B. Ware, as trustee for her said son, directing said trustee to invest said sum and pay the income, after deduction of expenses, to said son in annual installments until he arrived at the age of thirty-five years, and then to pay the principal to him.

Liberty B. Ware, who is also executor of the estate of Eunice Kinch, brought this action, requesting the direction of the court as to the disposition of said five thousand dollars, and also requesting the construction of another item of the will, which has been disposed of by agreement of the parties.

Liberty B. Ware, as trustee, filed an answer praying also for the instruction of the court as to said matters.

William H. Chapman is the administrator of the estate of said son, and by proper pleading is claiming that said son survived his mother, and that he, as said administrator, is entitled to said bequest.

Legatees under the residuary clause of said will of Eunice Kinch, claim that said son did not survive his mother, and that said bequest lapsed and passed to them under the residuary clause of the will.

Other defendants, brothers and sisters of Eunice Kinch, filed answers claiming said bequest lapsed and that it did not pass to the residuary legatees, but became intestate property and should be distributed, one-half to them and one-half to the brother of the deceased husband of Eunice Kinch from whom she inherited the property, under General Code, Section 8574.

The record is largely made up of the testimony of survivors of said disaster, for it is recognized that if said son survived his mother, the estate vested and the bequest should go to his administrator.

As said son did not leave issue surviving his mother, the common law rule applies, and no estate vested in him unless he sur-

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vived his mother. It therefore follows that the burden of proving survivorship of the son is upon his administrator. We do not feel that the fact that this legacy was given to a trustee for the son changes the rule as to the burden of proof, for the trustee could not take a beneficial interest *for the son* unless the son was alive at the time of the death of his mother, and the foundation of the claim of the son's administrator in this case is that the trustee took a beneficial interest for the son, which by his death passed to such administrator.

To state the proposition in another way: While there is no presumption that two persons who perish in a common disaster die at the same time, still if there is no evidence which establishes by the degree of proof required that one or the other died first, then the fact of survivorship can not be ascertained and the law is applied as if they both died at the same time. In other words, the impossibility of proving which died first, so far as the question of burden of proof is concerned, leads to the same conclusion as a presumption that they both died at the same time.

If the mother and son both died at the same time, the administrator of the son has no interest in the funds in question, and if he has any such interest it is because the son survived the mother, therefore the burden of proving survivorship is upon the administrator.

On the question of survivorship, the party having the burden of proof is not aided by any presumption and has no presumption to overcome. It is purely a matter of evidence. If there is no evidence on the subject, or if the evidence does not establish a probability, the party having the burden fails. In cases where the evidence is conflicting or where the inferences to be deduced from different proven facts are conflicting, the degree of proof to sustain the burden is greater than where the uncertainty results from merely the meagerness of the evidence. In the latter case very slight evidence may be sufficient to sustain the burden of proof, for courts settle questions of fact upon probabilities rather than upon certainties, although mere possibilities will not sustain a legitimate inference of the existence of a fact.

Cincinnati, H. & D. Railway Co. v. Fry, 80 O. S., 289; *Davis v. Guarnieri*, 45 O. S., 471.

If there is no evidence in this record beyond the fact that the mother and son perished in a common disaster, we can make no finding as to survivorship, but there is some evidence in the record on that subject, from which, it is claimed, the natural inference is that one probably survived the other. It was not an unknown calamity or one of instantaneous operation, nor yet one to which there were no surviving witnesses. It is clearly a case to be determined by the evidence, although the conclusion we reach may not be a certainty, and there may remain some obscurity and doubt; still, if the evidence gives rise to not merely conjecture, but is such as creates a probability and leads a fair-minded man to a conclusion in which he can honestly say he is convinced, that is all that is required.

The evidence discloses that the *Lusitania* was a passenger vessel, slightly more than 750 feet long and about 88 feet in breadth, and that it had six decks for the accommodation of passengers, known as A, B, C, D, E and F; decks A, B and C, being farthest up from the water, were open decks, while there was no open promenade on decks D, E and F. Mrs. Kinch, who was forty-five years of age, occupied cabin D-92, and her son, twenty years old, occupied cabin D-90, both on D deck and close together, and both were second-class cabins. There were over 1,250 passengers in all and only approximately thirty-five per cent. of the passengers were saved.

The vessel was near the coast of Ireland. The day was clear, and the ocean calm. The torpedo struck the vessel on the starboard, or right-hand side, somewhat forward of midships, tearing a hole in her side, but the explosion was not loud and the officers of the boat acted for a time, at least, upon the theory that there was no immediate danger of the vessel sinking, but very soon after the explosion—almost immediately—the vessel started to list to starboard and to sink by the bow, the stern raising somewhat, and she continued to sink in that manner, bow first and listing to the right, until she disappeared gradually and with comparative little or no suction, about twenty

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minutes after being torpedoed. The listing of the vessel prevented use of the lifeboats on the port side, but a few boats were launched from the starboard side, some of which were overturned in the launching. Some passengers jumped into the water before, and just as the vessel went down, and many went down with the vessel. As has been said, Mrs. Kinch occupied cabin D-92 on D deck and her son occupied cabin D-90 on D deck. These cabins were in the stern of the boat, the end of the vessel last to go under water.

The testimony is conflicting as to when the water reached the part of D deck where these cabins were, but the evidence establishes that these cabins were under water an appreciable time before that part of A deck, which was above these cabins, was under water.

Mrs. Kinch was not seen after the torpedo struck, but there is in the record the testimony of a witness who was with the son at the time the torpedo struck, and who saw him on A deck, 28 feet above D deck, at the time the boat disappeared. He was on A deck on the part of the vessel last to go under the water.

If at that time his mother was in her cabin on D deck, it is certain that she perished before the son. The testimony as to her whereabouts, is as follows:

Arthur Gasden, a survivor, testified that he knew Mrs. Kinch; that he occupied cabin D-90 with the son, which was close to cabin D-92 occupied by Mrs. Kinch; and three times in his testimony he swears positively that Mrs. Kinch was in her cabin on D deck when the boat went down. How he knows that, does not appear from the evidence. His testimony was taken by deposition and was given in answer to interrogatories, and there were no cross-interrogatories or cross-examination. There is testimony that it was the custom of Mrs. Kinch to take a nap after the noon-day meal, and that the son put in the time after the torpedo struck looking for his mother and did not find her. Mr. Gasden testifies that he was with the son on A deck at the time the torpedo struck, and that he and the son started to go to the cabins in question on D deck, and that when they got part way down between C and D decks they turned back on account of water being on D deck.

The testimony of other witnesses is such that if this trip was undertaken immediately after the torpedo struck, or at any time within a few moments before the vessel disappeared, the probabilities are that there was no water on D deck at that time, so that there was ample time for Mrs. Kinch to leave her cabin and go up higher on the boat. The testimony of Gasden is that he and the son turned back, and he secured a lifebelt from a cabin on C deck, and that they then separated, the son having said on the way down that he would try to get to and save his mother; and that later on he met the son on A deck, and that he said that he had tried and could not find his mother; that this statement was made very shortly before the vessel disappeared, and while the son and the witness were on A deck, above D deck, that being the part of the vessel last to disappear under the water, and that the witness jumped into the water and last saw the son standing on said part of A deck just before the vessel disappeared. The testimony of this witness is not contradicted in any particular except that there was not water on D deck until shortly before the vessel disappeared.

There is testimony of other survivors who occupied cabins on D deck near Mrs. Kinch, who left their cabins after the torpedo struck and survived, and of course there is the possibility that Mrs. Kinch was some place else in the boat, or that she left her cabin and escaped to the top deck and either got into some of the lifeboats that were wrecked or went down with the boat, or that she jumped overboard before the final disappearance of the vessel, but the testimony is that the son was looking for her and did not find her, and that Gasden, the witness, knew her and did not see her; that both of them were moving about in different parts of the ship and that she was not seen.

Gasden was in a position where he would likely know something about the whereabouts of Mrs. Kinch. He occupied a cabin with her son and in close proximity to her cabin. He knew of her habits and condition. He started with the son to her cabin. He knew that he did not see her any place, and he knew that the son was looking for her and did not see her, and he testified positively that she was in her cabin. Cross-examination might have weakened or strengthened his statements, but we are

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of the opinion, considering all the facts and circumstances disclosed by the record, that the evidence preponderates in favor of the claim that the mother was in her cabin and that the son survived her.

It follows that a decree may be drawn directing the executor to pay said bequest with interest from May 7, 1916, to William H. Chapman, administrator of said son, less general taxes on said bequest and less all unpaid costs in common pleas court and in this court in this action, and in case No. 2208 in this court, which costs shall include a fee of \$500 hereby allowed Liberty B. Ware.

Judgment accordingly. Case No. 2208 dismissed, no record.

GRANT, J., and DUNLAP, J., concur.

FINANCIAL TRUST RELATIONSHIP BETWEEN HUSBAND AND WIFE.

Court of Appeals for Tuscarawas County.

RICHARD V. PARSONS ET AL.

Decided, August 18, 1916.

Husband and Wife—Income of Wife Invested by Husband in His Own Name—Rules Governing the Engrafting of a Trust on Real Property and on Personalty—Presumption Where Possession is in the Husband.

1. A trust engrafted on an absolute deed may be shown by parol evidence; but the declaration of such trust must be contemporaneous with the deed, and the evidence beyond a reasonable doubt as to the existence of the trust, and clear, certain and conclusive as to its terms and conditions.
2. A different rule prevails as to a trust in personal property, and the owner thereof can impress it with a trust by means and acts that would be wholly insufficient to impress a trust upon the title to land.
3. Whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence

of any direct evidence that she intended to make a gift of it to him.

4. The mere possession of the separate property of the wife by the husband does not prove that the title has passed from the wife to him, and in such case it lies upon one who asserts it to be the property of the husband to prove a transmission of the title, either by gift or contract for value.

R. N. Wilkin and T. J. Russell, for plaintiff.

J. G. Patrick and J. F. Stephenson, for defendant Parsons.

W. I. Kinsey, for administrator.

POWELL, J.

The plaintiff in this case is the widow of James A. D. Richards, late of this county, and is one of the legatees named in his will. The defendant Frances A. Parsons is the daughter of said decedent, and his only child, to whom he devised and bequeathed the entire residue of his estate after making a special provision in his will for the plaintiff, his widow. The defendant Kinsey is the administrator with the will annexed of said decedent, and files answer herein.

The plaintiff for a cause of action seeks to have a trust declared in her favor in the entire estate, real and personal, of which the said testator died seized; and in her amended petition, on which the case was tried, sets out in great detail the claims she makes with reference thereto, and describes the property, real and personal, to which she avers such trust attaches.

With the evidentiary matter set out in the amended petition eliminated, it presents but a single issue or question of fact for the adjudication of the court, and that issue is whether or not there was a financial trust relationship existing between the plaintiff and her said husband during almost the whole of their married life, and still existing at the time of his death, in which the said decedent was the trustee and the plaintiff was the beneficiary or *cestui que trust*. If this issue should be resolved in the affirmative, then there would arise other questions, incidental thereto, relating to the terms, conditions and extent of such trust, and the amount of all of the property to which such trust attaches.

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Each of the defendants filed an answer in which certain admissions of fact are made as well as a general denial of all the other averments in the petition, the first defense being in legal effect a general denial of the material averments of the petition. For a second defense, the bar of the statute of limitations is interposed. A reply was filed by the plaintiff to each of said answers, denying some matters set out therein, and denying also that the action of plaintiff as set out in her amended petition is barred by the statute of limitations. Upon the issues thus joined the case was tried in the court of common pleas, resulting in a finding and judgment in that court for the plaintiff in the sum of \$2,500. From this finding and judgment an appeal was taken to the court of appeals for this county, where the case was sent to a referee with instructions to hear the testimony, have the same reduced to writing and report it together with his findings of fact and conclusions of law to this court for judgment. The referee, upon a hearing had by him, found in favor of the defendants, and found that no such trust relationship existed as was set out and alleged in the amended petition. The case is now before us on motion of the plaintiff to set aside the report of the referee, and for judgment on the testimony offered; and also on motion of defendants to confirm the report of the referee.

The record, in brief, discloses that shortly after the marriage of plaintiff and the said James A. D. Richards she studied medicine and was admitted to practice, and that she was a practicing physician for many years prior to the death of her said husband; that she acquired a large and lucrative practice from which she secured a good income; that a large amount of the money so earned by her was placed in a common or joint fund with the money of her husband, or was expended by her in the payment of household expenses.

Plaintiff's claim is that there was an understanding or agreement between her and her husband that whatever property they had or acquired after she became a practicing physician was the joint property of both in equal shares, notwithstanding the title to the same was taken in the name of her husband. It is

contended by her that, for reasons that appeared to her satisfactory, the title of all the real estate acquired, although paid for with their joint funds, was placed in the name of her husband to avoid suits for malpractice which might be brought by unscrupulous or designing patients, although it was understood and agreed between her and her husband, that she was the real owner of the one-half of all such property.

First, as to the real estate described in the petition, standing in the name of James A. D. Richards at the time of his death. It is held in *Russell et al v. Bruer et al*, 64 Ohio St., 1, that:

“A trust engrafted on an absolute deed may be shown by parol evidence; but the declaration of such trust must be contemporaneous with the deed, and the evidence beyond a reasonable doubt as to the existence of the trust, and must be clear, certain, and conclusive as to its terms and conditions.” See, also, *Boughman v. Boughman*, 69 Ohio St., 273.

If this rule is applicable to the case under consideration, no trust would attach to any of the real estate described in the petition. The evidence in the case, which we have carefully examined, does not show any declaration of trust at the time any of the deeds were made to the said James A. D. Richards, nor are the terms and conditions of any such trust shown by the evidence, nor is the evidence of the existence of a trust of that degree of certainty required by this rule. Neither does the record show any evidence of fraud on the part of said decedent in the purchase of any part of said real estate that would justify the finding by a court that said decedent was the agent or trustee of his wife in the procurement of such real estate; in other words, there was no direction on the part of the plaintiff that any money which she acquired in her own right was given to her husband with instructions to invest the same in her name. So far as the prayer of the petition asks for a decree of a share of the real estate described therein, it will have to be denied because not sustained by such evidence as is required by law.

A different rule, however, prevails as to a trust in personal property, and the owner thereof can impress it with a trust by means and acts that would be wholly insufficient to impress a

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trust upon the title to land. (*Bruer et al v. Johnson et al*, 64 Ohio St., 7.) In *Stickney v. Stickney*, 131 U. S., 227, by the Supreme Court of the United States, under the laws of the District of Columbia relating to the property rights of married women, which are practically the same as the statutes of this state relating to the same subject, it is said, at page 238:

“Whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him. * * * It is impossible for us to declare that the mere possession of it by the husband is proof that the title has passed from the wife to him. After it has been shown, * * * that the property accrued to the wife by descent from her father’s and brothers estates, the presumption necessarily is that it continued hers. In such case it lies upon one who asserts it to be the property of the husband to prove a transmission of the title, either by gift or contract for value.”

These rules apply to personal property, or to cases where the wife’s money has been turned over to the husband with directions to invest it in the wife’s name, but which the husband has failed to do, or has invested in his own name. In such case the fraud of the husband in not following the directions of the wife is the basis of the trust. A familiar example of the latter class of cases is the case of *Newton v. Taylor*, 32 Ohio St., 399.

Money once earned by the wife for professional services, or otherwise acquired by her, as between her and her husband, remains her separate property unless a gift be proved, or that the title has been transmitted from her to him by contract for value received. *Bechtol v. Ewing, Admr.*, 89 Ohio St., 53.

This rule is in contravention of the rules of the common law. There is now no such thing known to the law of Ohio as a “reduction to possession” of the estate of the wife by the husband. Her individual property at marriage remains her property until disposed of by her by gift or otherwise. The statutes have made this change. Such money of plaintiff as the proof shows went into the hands of her husband for his own use and was invested by him in his own name, can be recovered by her. This

relates especially to the principal sum and not to her daily income otherwise used. Such parts of her daily income as she saw fit to use in the payment of household expenses without any agreement between her and her husband that the same should be repaid, can not be recovered from her husband's estate. (*Courtright v. Courtright*, 53 Ia., 57, and *Darnaby v. Darnaby's Assignee*, 14 Bush [Ky.], 485.) And this is true even though it is statutory that "the husband is the head of the family" and "must support himself, his wife, and his minor children out of his property or by his labor." Sections 7995 to 8004, General Code.

The question then comes, What does the record show in this case as to money or other personal property of the plaintiff having been advanced by her to her deceased husband, and invested by him in real estate in his own name, or otherwise used by him? The record shows that plaintiff for part of her married life had a bank account of her own created by her out of her own separate means, and which she would have had the legal right to keep in her own name, except in circumstances not shown to exist in this case. From this account she paid by checks for the benefit of her husband, or for property the title to which was taken in his name, the sum of \$2,254.74. This money went into and became a part of his estate and should be accounted for by his estate to her. She should receive this amount and something more than this, for it seems clear to the court that this much and more was received by him from her. This is proved by a large number of diaries kept by him during his lifetime, in which were entered in large part the receipts of money by him from her. How much more the amount should be, the court can not say with exactness, for much of the testimony offered and many of the exhibits are valueless as evidence; but we have concluded from the whole evidence that the sum of \$2,500 is as nearly right as can be worked out from the testimony adduced. It follows from this that the finding of the referee that no trust relationship existed will be set aside and judgment given the plaintiff in the sum of \$2,500, to be paid out of the assets of the estate of said decedent remaining unadministered in the hands of the defendant.

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Kinsey, as such administrator. The costs of this proceeding will be adjudged against the administrator, and the case will be remanded to the court of common pleas to carry this finding and judgment into execution.

Judgment for plaintiff.

SHIELDS, J., and HOUCK, J., concur.

WAIVER OF VENDOR'S LIEN.

Court of Appeals for Stark County.

RAECHAL REA HART v. CHAS B. SALA, ADMINISTRATOR OF
FRANK B. HART, DECEASED.

Decided, October Term, 1918.

*Vendor's Lien—Attaches Where Other Security is Not Relied Upon—
But Acceptance of Distinct and Separate Security—Amounts to a
Waiver of the Equitable Lien of the Vendor, When.*

Where the vendor of land who has taken a mortgage on the premises conveyed to secure the debt, also takes a cognovit note signed by the vendee and his wife in addition to the mortgage and afterwards cancels the mortgage of record, the taking of the cognovit note and release of mortgage show an unequivocal intention on his part not to rely on the land for security, and constitute a waiver of the vendor's lien.

Ammerman & Mills, for plaintiff.

Isaac H. Taylor and William Simpson, contra.

METCALFE, J.

The only question for determination in this case is, whether or not Hiram H. Hart has a vendor's lien on certain lands which are described in the petition.

On the 23d day of November, 1913, Hiram H. Hart conveyed the land in question to his son Frank B. Hart for the consideration of two thousand dollars. On the same day Frank B. Hart

and his wife Raechal Rae Hart executed to Hiram H. Hart a mortgage on the premises conveyed for the entire amount of the purchase price, and at the same time Frank B. and Raechal Rae Hart executed to Hiram H. Hart two cognovit notes of one thousand dollars each.

The mortgage was duly recorded and on the 7th day of December, 1914, Hiram H. Hart cancelled said mortgage by entering upon the margin of the record thereof a release in full.

Afterwards, Frank B. Hart died and soon after his death Hiram H. Hart began an action against Raechal Rae Hart upon said cognovit note and obtained judgment against her for the entire amount thereof.

Under these circumstances does Hiram H. Hart still retain a vendor's lien? It is settled beyond controversy in Ohio that a lien exists in favor of the vendor of land, and that the taking of a mortgage upon the land is not a waiver of such lien. *Ankettell v. Converse*, 17 O. S., 11; *Boos v. Ewing*, 17 O., 500; *Edwards v. Edwards*, 24 O. S. 402.

It is equally well settled that the taking of additional security, that is to say, securities other than the land in question, waives the lien. *Williams v. Roberts*, 5 O., 35; *Schurtz v. Colvin*, 55 O. S., 274; *Mayhan v. Combs*, 14 O. S., 428.

The diligence of counsel in the case has not been able to furnish us with any adjudication of the question here involved; that is, whether or not the cancellation of the mortgage by the vendor is a waiver of the lien.

The doctrine that the taking of a mortgage by the vendor did not waive the lien was not determined in Ohio without a very vigorous protest on the part of one of the ablest judges who ever sat upon the Supreme bench.

In *Boos v. Ewing*, 17 O., 500, where the majority of the court held to that doctrine. Judge Hitchcock rendered a very vigorous dissenting opinion. On page 527 he uses this language:

"The extent to which this court has heretofore gone is to establish the principle that a vendor has a lien upon the land sold for his purchase money, provided he takes no other security for its payment than the personal security of the vendee. But,

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if he has taken any other security, let it be real or personal, the security so taken must be relied upon—the implied lien is extinguished. The same principle of a rule prevails, as I understand, in all of the other states of the union where this implied lien is recognized. And it is a rule founded in reason, provided there is reason, in saying that a man can have an interest in land after having done all he could by absolute conveyance to divest himself of all interest.”

In *Brown v. Gillman*, 4th Wheaton, 455, the court said:

“The equitable lien of the vendor of land for unpaid purchase money is waived by any act of the parties showing that the lien is not intended to be retained, as by taking separate security for the purchase money.”

In the same case reported in 1st Mason, 212, Chief Justice Gibson of the Supreme Court of Pennsylvania says:

“In a careful examination of all the authorities I do not find a single case in which it has been held if the vendor takes a personal collateral security binding others as well as the vendee, as for instance, a bond or note with a security or endorser, or a collateral security by way of pledge or mortgage, that under such circumstances a lien exists upon the land itself.”

In *Schurtz v. Colvin*, 55 O. S., 274, it is unequivocally held that the vendor of land who takes a mortgage upon the premises, including in the same other lands of the vendee thereby waives his lien for the purchase money.

“A vendor’s lien is at least presumptively waived when he accepts any distinct and independent security for the purchase money, as for example, — the note — of the purchaser with personal security” * * * 39 Cyc. 1835.

“No lien for the purchase money upon a sale of real property will attach where the vendor takes from the vendee personal security for the payment of the consideration money.” *Follet v. Reese*, 20 O., 463.

“The vendor’s lien is lost where the vendor takes real or personal security for the payment of the purchase money.” *Mayhan v. Combs*, 14 O., 429.

“The vendor of land who makes a conveyance and takes notes with personal security for the purchase money does not

retain a lien on the land for that purchase money." *Williams v. Roberts*, 5 O., 36.

The doctrine of these cases seems to us to rest upon the proposition that where the vendor does some act which shows an unequivocal intention on his part not to rely upon the land to secure the payment of the purchase money he thereby waives the lien.

It seems to use clear that the taking of the cognovit note with the additional personal security of the name of Raechal Rae Hart thereon, followed by the act of the vendor in cancelling the mortgage upon record shows a clear intention on his part not to rely upon the land for security of his indebtedness.

We do not feel that the law relating to the maintenance of vendor's liens should be extended any farther than it has already gone. To allow a vendor to retain a lien after he has taken a mortgage upon the premises is the law. But, to allow him to retain the lien after he has deliberately canceled the mortgage upon the record and given notice to the world that he does not rely upon the land for security, or that his security is extinguished, is to allow him to play fast and loose with the rights of others and to hedge around him a legal protection when he has not seen fit to protect himself.

We think that when Hiram H. Hart took the personal security of Raechal Rea Hart and canceled the mortgage upon the record, he gave notice that he did not rely upon the land for security, and that he thereby waived his lien.

The judgment of the lower court is reversed.

POLLOCK, J., and FARR, J., concur.

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Hamilton County.

**STREET CAR PASSENGER EJECTED BECAUSE OF
MISTAKE IN HIS TRANSFER.**

Court of Appeals for Hamilton County.

GEORGE S. DIEHL V. THE CINCINNATI TRACTION COMPANY.

Decided, June 17, 1918.

Degree of Care Required of a Passenger—With Respect to the Correct Punching of a Transfer Issued to Him—Effect of a Correct Charge to the Jury Destroyed by a Subsequent Instruction.

1. While a passenger on a street car should exercise ordinary care and prudence in receiving and making use of a transfer, he is not required to scrutinize it for the purpose of ascertaining whether or not the conductor has punched it correctly, particularly where the transfer itself contains no directions as to the proper method of punching.
2. In an action for damages against a street railway company for ejecting a passenger from one of its cars because the transfer which he tendered was improperly punched, it is error, after giving a special charge at the request of the plaintiff which correctly stated the law with reference to the care required of a passenger in asking for and accepting a transfer, to destroy the force and effect of the instruction so given by a special charge given at the request of the defendant to the effect that in receiving, examining and using a transfer the passenger is bound to exercise such degree of care as ordinarily prudent persons are accustomed to exercise with regard to such a matter under similar circumstances, or in leaving to the jury to determine whether or not plaintiff used due care with reference to the proper marking of the transfer given him.

Fulton & Woost, for plaintiff in error.

Wilby & Stewart, contra.

WILSON, J.

This action was instituted below by George S. Diehl against the Cincinnati Traction Company to recover damages for an alleged wrongful ejectment from one of defendant's cars.

The evidence discloses the fact that the plaintiff became a passenger on a Vine-Clifton car, and when paying his fare he

asked for and received a transfer slip to an East End car; that the conductor punched the date of expiration as 8:15 A. M., which was about the time the transfer was given plaintiff; that plaintiff left the Vine-Clifton car at Fifth and Vine streets and went directly to Fourth and Vine street, where he boarded an East End car, and on presenting the transfer the conductor refused to accept it, stating that the time limit on the transfer had expired, and plaintiff, refusing to pay an additional fare, was ejected from the car.

The action was one in tort. The act of the first conductor in erroneously punching the hour of issuing the transfer as the hour at which the transfer would expire was a wrongful act; and the act of the second conductor in refusing to accept the transfer and ejecting plaintiff from the car is a consequence of the first wrongful act for which the company became liable in tort. The conductors, being agents of the company, their acts were the acts of the company for which the company would be liable, if done in the scope of their agency.

The company undoubtedly has a right to make reasonable rules for the conduct of its business and to require its agents to strictly enforce them, but that will not absolve it from liability when one of its agents, in compliance with a rule of the company, erroneously ejects a passenger from the car. The authorities are uniform that when by the fault of an agent of the company a passenger is given a ticket imperfectly or erroneously stamped and is ejected from the car or train by the conductor in pursuance of the rules of the company, it is liable to him as for a tort.

On the last hearing of the cause below the court was asked by the plaintiff and did give the following special charge:

“A street car passenger who has paid his fare to the conductor of the car in which he has become a passenger, and who then requests of the conductor a proper transfer to another car in a connecting line for a continuous ride, to all of which he is entitled under the law, and who has received from such conductor a transfer slip to such a car, is not required by law to scrutinize such transfer-slip for the purpose of ascertaining whether or not a mistake has been made by the conductor in issuing the transfer-slip, but may assume that a proper transfer has been issued to

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him by the conductor, in the absence of any other fact or incident to suggest an inquiry.”

A verdict was returned for the defendant below and judgment entered thereon.

Plaintiff is now prosecuting error to this court, and is complaining that while the court gave the special charge requested by plaintiff, he nevertheless gave a special charge requested by defendant, and also in his general charge used language which destroyed the force and effect of the special charge requested by plaintiff and given by the court. The special charge so requested by defendant below and given by the court is as follows:

“In order to recover in this case, the plaintiff must have been without fault in receiving and making use of the transfer; and if you find that in receiving, examining and using the transfer plaintiff did not exercise such care as ordinarily prudent persons are accustomed to exercise concerning such a matter under the same or similar circumstances, then your verdict must be for the defendant.”

The court in its general charge instructed the jury (R., 78) that it was for the jury to decide—

“whether or not he (plaintiff) used due care himself in seeing that the transfer when received was properly marked.”

And again, the court stated (R., 79) that—

“It is the duty of a person receiving a transfer to use ordinary care in seeing that that transfer is properly marked.”

The court again charged the jury (R., 79) that—

“If the plaintiff in the case used ordinary care in seeing that that transfer was properly punched, then it is the duty of the defendant company to accept such transfer.”

It will be seen that the court, in giving the special charge requested by the defendant, and in his general charge, instructed the jury, in effect, that it was the duty of the plaintiff not only to examine the transfer slip, but also to scrutinize it for the purpose of ascertaining whether or not the conductor in issuing the

transfer had made any mistake in marking or punching the same, and that if he had not used ordinary care in seeing that it was properly punched, then their verdict must be for the defendant.

Upon a former hearing of this cause in this court it was held that the court below had erred in refusing to give special charges requested by plaintiff below, one of which was the special charge hereinbefore set forth as given by the court below on the last trial of the cause. The court at that time held that while the passenger should exercise ordinary care and prudence about the receiving and making use of a transfer, he was not required to scrutinize such transfer for the purpose of ascertaining whether or not the conductor had made a mistake in punching it, especially in view of the fact that the transfer itself contains no directions as to punching, in regard to time, which would enable the passenger to determine whether or not it was properly punched. In so holding the court followed a long line of decisions, among them: *Memphis St. Ry. Co. v. Graves*, 110 Tenn., 232; *P., C., C. & St. L. Ry. Co. v. Reynolds*, 55 O. S., 370; *Ann Arbor Ry. Co. v. Amos*, 85 O. S., 300; *L. S. & M. St. Ry. Co. v. Mortal*, 18 C. C., 562; *Cleveland City Ry. Co. v. Conner*, 74 O. S., 225.

The special charge requested by the plaintiff below and given by the court embodied the law of the case, and the court erred in modifying said charge by the giving of said special charge requested by the defendant, and in instructing the jury orally as he did in his general charge, thereby destroying the force and effect of plaintiff's charge, and in addition thereto erroneously instructing the jury as to the law of the case.

Section 11447, General Code, provides that either party—

“may present written instructions to the court on matters of law and request them to be given to the jury, which instructions shall be given or refused by the court before argument to the jury is commenced.”

And it further provides, paragraph 7—

“A charge or instruction when so written or given, shall not be orally qualified, modified or in any manner explained to the jury by the court.”

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The courts of Ohio have repeatedly held that under and by virtue of said Section 11447, General Code (Section 5190, Revised Statutes), when written instructions are given, it is error for the court to orally modify or qualify them, as was done by the court below in this case. *Caldwell v. Brown*, 9 C. C., 691; *Cincinnati v. Lochner*, 8 O. N. P., 436; *Railway v. Conner*, 6 C.C.(N.S.), 361; *Rupp v. Shaffer*, 21 C. C., 643; *Railroad v. Stallman*, 22 O. S., 1; *Commissioners v. Swanson*, 21 C.C.(N.S.), 489.

When two inconsistent charges are given, one of which is erroneous, and it is impossible to say which one the jury followed, the verdict should be set aside. *Insurance Co. v. Purcell*, 19 C. C., 135; *Rapp v. Becker*, 16 C. C. Dec., 321.

The court below further charged the jury as follows:

“It is for you to decide whether or not the plaintiff was a passenger upon the Vine-Clifton car as alleged in his petition; whether he paid his fare; whether he asked for a transfer to the East End car; whether said transfer was given to him; * * * and whether he tendered said transfer, and whether it was refused.”

These facts were all admitted, either in the answer of defendant or in the opening statement of counsel for defendant, and therefore were facts not at issue in the case and it was error on the part of the court to charge the jury that it was for the jury to decide whether or not those admitted facts were true.

The court is therefore of the opinion that the errors above stated were prejudicial to the rights of plaintiff below, and for that reason the court is constrained to order that the judgment below be reversed and this cause be remanded to the court below for a new trial.

JONES, P. J., concurs.

HAMILTON, J., dissenting.

I can not concur in the judgment of reversal. The special charge which was given for plaintiff was the law as laid down in the case of *Railway Co. v. Conner*, 74 O. S., 225, and the special charge given at the request of the defendant is not inconsistent therewith. The court, both in the special charges

and in the general charge, left the question of negligence to the jury, basing its instructions on the proposition that the degree of care required was the exercise of "such care as ordinarily prudent persons are accustomed to exercise concerning such a matter under the same or similar circumstances," and the use of the term "examine," in the court's charge, with reference to the duty of plaintiff, is approved by the Supreme Court in the Conner case.

The majority opinion says:

"It will be seen that the court in giving the special charge requested by the defendant, and in his general charge, instructed the jury, in effect, that it was the duty of plaintiff not only to examine the transfer slip, but also to scrutinize it for the purpose of ascertaining whether or not the conductor in issuing the transfer had made any mistake in marking or punching the same."

I am unable to see wherein the charges justify the use of the word "scrutinize." To examine as a prudent person does not mean to scrutinize. To scrutinize means to examine or observe closely in detail; to investigate minutely. The law does not require the passenger to scrutinize his ticket and there is nothing in the charge to indicate to the jury that such is the law. The court may have gone farther in its charge in detailing that "It is the duty of a person receiving a transfer to use ordinary care in seeing that that transfer is properly marked" than would be justified if this part of the charge stood alone, but taking it in connection with the whole charge, I do not think the jury were misled.

On the other ground of reversal as found by the majority of the court—that the trial court erred in charging on undisputed facts—I am inclined to agree with counsel for plaintiff in error rather than with the majority of the court. The plaintiff in error in his brief says: "This objection to the charge would not be sufficient, perhaps, to reverse the judgment, if it stood alone." Finding no other error, I do not think this objection sufficient to justify a reversal.

I am therefore of the opinion that the case was fairly tried under the law and the judgment should be affirmed.

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VALIDITY OF SERVICE OF SUMMONS ON A VICE-PRESIDENT.

Court of Appeals for Lucas County.

CHARLES D. TOWNE V. NATIONAL MACHINERY CO.*

Decided, December 11, 1917.

Corporations—Quashing Summons Not a Final Order—Second Vice-President Becomes Ipso Facto First Vice-President, When—Service on Vice-President Valid, When—Service on Chief Officer in any County Effective in a Personal Injury Case.

1. An order by a court of common pleas quashing on motion a service of summons, is not a final order or judgment to which error can be prosecuted.
2. On the death of the first vice-president of a corporation the second vice-president becomes *ipso facto* first vice-president and may take the place and perform the duties of the president in his absence.
3. Where the president of an Ohio corporation is a non-resident of the state and absent therefrom, service of summons on the corporation may be made, by virtue of the provisions of Sections 11272 and 11288, General Code, on the vice-president, such officer being a chief officer within the meaning of said sections.
4. An action for personal injuries may be brought against an Ohio corporation in any county of the state in which service of summons can be made on a chief officer of the corporation.

Kohn, Northup & McMahon, for plaintiff in error.

J. C. Royer and McCauley & Weller, contra.

RICHARDS, J.

The defendant is an Ohio corporation having its situs and manufacturing plant and principal office in the city of Tiffin, Seneca county, Ohio. The plaintiff brought an action against the defendant in the court of common pleas of Lucas county to recover damages for personal injuries claimed to have been suffered by him while employed in its plant in the city of Tiffin. It is stated in the brief of counsel for the defendant and is not

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court February 5, 1918.

disputed that the plaintiff was at the time of the commencement of his action a resident of the county of Seneca.

Upon the filing of the petition summons was issued to the sheriff of Lucas county, the return of the sheriff showing service by delivering personally a copy of the summons, with endorsements thereon, to Augusta Rohn, the vice-president and one of the chief officers of the National Machinery Co., the sheriff certifying that no other chief officer of said company could be found in Lucas county.

The defendant appearing for the purposes of the motion only, filed a motion in the court of common pleas to set aside the return of service of summons for two reasons: (1) Because Augusta Rohn upon whom service of summons was made as vice-president of the defendant and one of the chief officers of the defendant was not and is not a vice-president or chief officer of the company; and, (2) because a vice-president of a corporation is not a chief officer of such corporation. This motion was heard on evidence taken by the respective parties, and the court of common pleas, after hearing the evidence and the arguments of counsel, granted the motion and quashed the service of summons, to which decision error is prosecuted to this court.

On an examination of the record this court became convinced that the judgment quashing the service of summons was not a final order or judgment, basing its conclusion largely on the reasoning of the court in the case of *Tatum v. Geist*, 40 Wash., 575, and the authorities therein cited. Thereupon the court of common pleas on application duly made entered a *nunc pro tunc* judgment dismissing the plaintiff's petition as of the date of the quashing of the service of summons and adjudging that plaintiff pay the costs, and the record in this court has been corrected in accordance with such *nunc pro tunc* judgment.

The record now showing a final judgment, the question raised as to the sufficiency of the service of summons on Augusta Rohn as vice-president becomes a very important question of practice, the solution of which is to be reached by a construction, Sections 11272 and 11288, General Code, in connection with the evidence contained in the record.

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It appears from this evidence that the officers of the National Machinery Co. were M. Frost, president; H. M. Reynolds, vice-president; Augusta Rohn, second vice-president; William L. Hertzner, treasurer, and Earl R. Frost, secretary and manager, and that H. M. Reynolds who had been chosen as vice-president died before the filing of the petition in this case. Augusta Rohn was elected second vice-president on July 11, 1911, and had been regularly re-elected as such vice-president each year up to and including January 16, 1917. It further appears that the president of the company, M. Frost, is and has been for many years a resident of Somerville, New Jersey, and that Mr. Reynolds, the vice-president, was at the time of his death and had been for a number of years theretofore a resident of the state of New York. The president of the company, M. Frost, was at the time of the bringing of this action and the service of the summons absent from the state of Ohio. Augusta Rohn was one of the largest stockholders of the company and had served for many years as a member of the board of directors and as a member of the executive committee or board of managers, and states in her affidavit which was introduced in evidence on the trial of the case that she had never discharged any duties for said company as second vice-president, nor had she attempted so to do. She had come to the city of Toledo on July 11, 1917, upon some private business of her own and not upon any business connected with that of the defendant company. While in the city on that day she was served with summons by the sheriff as already stated.

The code of regulations adopted by the company provides that the officers of the company shall consist of a president, a vice-president, a secretary and a treasurer, to be elected by the board of directors, and Section 33 of the code of regulations authorizes the board to elect or appoint such other officers as it may deem proper. Pursuant to the authorization contained in this section the board had for a number of years prior to the bringing of this action regularly elected Augusta Rohn as second vice-president. Section 43 of the code of regulations provides that in the absence or inability of the president to act the vice-president shall perform all the duties and may exercise any of the powers of the president subject to the control of the board.

A solution of the problem presented by this record as to the sufficiency of the service depends upon the answer to two questions:

First. Was Augusta Rohn at the time of the service vice-president of the company? and,

Second. If so, was the service on her as such vice-president a valid service within the provisions of the Ohio statutes cited?

By virtue of the authority vested in the board of directors to elect or appoint such other officers as it deemed proper and their exercise of such authority, Augusta Rohn became legally second vice-president of the defendant company and filled that office for a number of years up to and including the time summons was served upon her in this action. On the death of the first vice president, Mr. Reynolds, which occurred in May, 1917, Mrs. Rohn became *ipso facto* first vice-president of the company and was such at the time of the service of summons upon her. It is said in argument that her election as second vice-president was merely by way of compliment and without the expectation of conferring any rights or duties on her. The record, however, does not show such to be the fact. We must therefore conclude that at the time of the service of summons she was in fact and in law the first vice-president of the National Machinery Co.

The first section cited, to-wit, Section 11272, General Code, fixes the venue in actions brought against corporations and authorizes the bringing of such actions in the county in which such corporation is situated or has its principal office or place of business, "or in any county in which a summons may be served upon the president, chairman or president of the board of directors or trustees or other chief officer." The other section cited, to-wit, Section 11288, General Code, authorizes the service of summons "upon the president, mayor, chairman or president of the board of directors or trustees or other chief officer." Within the language of these sections if Augusta Rohn, by reason of the permanent non-residence of the president and his absence from the state of Ohio, became the chief officer of the defendant company then service upon her was authorized by the statute.

We are well aware of the rule that the statutory method of service of summons on a corporation is mandatory and must be

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strictly followed, and it naturally follows that where the statute designates a particular officer or person or class of persons on whom process shall be served, this requirement must be complied with in order to obtain jurisdiction. This rule is announced in various text books and in many adjudicated cases and admits of no uncertainty.

The general subject of service on the vice-president of a corporation is discussed in 3 Thompson, Corporations (2d Ed.), Section 3062, where the author uses the following language:

“The vice-president, as formerly shown, in the absence of the president, takes the place and performs the duties of the president. It may be asserted as the rule, and is believed to be sound law, that where statutes authorize service of process on the president of a corporation, then in his absence or where he can not be found, service on the vice-president is sufficient and binding on the corporation. This is not a violation of the rule already stated, that one officer can not be substituted where the law names another. But in such case the law itself substitutes the vice-president for the president, and no such rule applies to any other officer.”

We note particularly the importance of the latter portion of the quotation that “no such rule applies to any other officer.” This exception undoubtedly occurs by reason of the fact that the vice-president has no functions to perform except in the case of the absence, disability or death of the president, and that when the absence, disability or death of the president arises then his duties devolve upon the vice-president who thereby becomes for the time being chief officer of the company, and hence it results that this is not a substitution by the parties of one officer for another, but, as is said by the eminent author already quoted, the substitution is made by the law itself. Hence it is said in 2 Thompson, Corporations (2d Ed.), Section 1495, that in the absence of the president the vice-president is the chief officer of the corporation.

The identical question we are considering has been determined by several respectable authorities, among which is the case of *Comet Consolidated Mining Co. v. Frost*, 15 Colo., 310, under a statute which provided that service upon corporations should

be made by delivering a copy of the summons to the president or other head of the corporation, or to the secretary, cashier, treasurer or general agent thereof. While the phraseology of the statute is not literally the same as the Ohio statute, yet in substance and effect we construe it to be the same. Under that statute it was held that a service of summons upon the vice-president of the corporation was sufficient.

The question was also determined in the case of *Pond v. National Mortgage & Deb. Co.*, 6 Kans. App., 718. The Kansas statute under which this decision was reached appears to provide that service may be made upon the president, mayor, chairman of the board of directors, trustee, or other chief officer. In the course of the opinion the court say that, in the absence of the president of a corporation, it is the duty of the vice-president to act as president and at such times he is the chief officer of the corporation.

A like conclusion was reached by the federal court in *Ball v. Warrington*, 87 Fed., 695, where the same Kansas statute was under consideration.

The Supreme Court of Missouri has sustained the validity of service on a vice-president under a statute substantially identical with ours. See *Youree v. Home Town Mut. Ins. Co.*, 180 Mo., 153.

Indeed, our attention has not been called to any authority holding that a service upon a vice-president is insufficient in cases where the president is absent, disabled or dead, where the statute authorizes service upon the president or other chief officer. Many authorities hold that where such service is authorized it is not allowable to make service upon a secretary or treasurer because that would be substituting one officer for another, and such substitution can not be made by the parties, the only substitution allowed being that of vice-president for the president where the duties of the president devolve upon the vice-president in case of the absence, disability or death of the president. Under such circumstances the vice-president becomes the chief officer of the corporation for the time being and is within the language of the statute and service made on him is therefore valid.

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Counsel for the defendant cite *Karns v. State Bank & Trust Co.*, 31 Nev., 170, a decision of the Supreme Court of Nevada, where the statute authorizes a service on the "president or other head of the corporation, secretary, cashier or managing agent thereof." The court in that case had under consideration the sufficiency of a service on an assistant cashier of a bank, and it was, of course, held that such service was invalid. In the course of the opinion the court say:

"There is good reason for holding that, in the absence of the president, he becomes superseded by the vice-president, who, in effect, becomes the president or head of the corporation, endowed with the functions of the president and subject to service as 'the president or other head of the corporation.' "

Counsel for the defendant also rely on the case of *Oklahoma Fire Ins. Co. v. Barber Asphalt Pav. Co.*, 34 Okla., 149, a decision of the Supreme Court of Oklahoma. In that state the service of a summons on a corporation may be had upon the president, mayor, chairman of the board of directors or trustees or other chief officer, and the court had only to determine as to the sufficiency of a service upon a director of the corporation other than the chairman of the board and, of course, reached the conclusion that such service was not authorized. To sustain the validity of service under such circumstances would be a substitution by the court of one officer for another.

A majority of the court are of opinion that under the evidence introduced in this case and by virtue of the authority of the sections of the General Code cited, service of summons on Augusta Rohn as vice-president of the defendant company was authorized and was a sufficient service.

The judgment will therefore be reversed and the case remanded to the court of common pleas for further proceedings.

CHITTENDEN, J., concurs; KINKADE, J., dissents.

PUBLICATION OF LETTING OF CONTRACT TO IMPROVE ROAD.

Court of Appeals for Mahoning County.

STATE OF OHIO, EX REL BOYD, A TAX-PAYER, v. ROBERT
McMASTERS ET AL.

Decided, June 7, 1918.

Roads—Publication of Mode and Time for Advertising for Bids Mandatory—Meaning of the Words “for Two Consecutive Weeks”—Contract Rendered Invalid by the Giving of Less than Two Full Weeks’ Notice.

1. A statute requiring the state highway commissioner, before letting a contract to build an improved road to “advertise for bids for two consecutive weeks,” is mandatory and must be strictly complied with.
2. The term “two consecutive weeks,” as used in such statute, means two full calendar weeks.

Henderson, Nicholson, Anderson & Warnock, for plaintiff in error.

Paul Huxley, Prosecuting Attorney, contra.

METCALFE, J.

This action is brought by a tax-payer against the commissioners of Mahoning and Columbiana counties, and the state highway commissioner to enjoin the construction of a proposed improved highway upon the county line between Mahoning and Columbiana counties.

It is claimed that the contract to build such road entered into by the commissioner of state highways, and the construction company is illegal for several reasons.

First, it is claimed that the advertisement for bids for the construction of the road was not published the length of time required by statute (106 O. L., 634).

The section of said law was Section 199 of the original law and is now Section 1206 of the General Code. The statute provides:

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“Upon receipt of a certified copy of the resolutions of county commissioners, or township trustees that such improvement be constructed under the provisions of this chapter. The state highway commissioner shall advertise for bids for two consecutive weeks in two newspapers of general circulation, and of the two dominant political parties published in the county or counties in which the improvement or some part thereof is located, if there be any such papers published in said counties.”

That is all of the statute that applies to the questions here.

It appears from the agreed statement of facts that an advertisement for bids to be received on the 19th day of May, 1916, was published in two newspapers of general circulation of the dominant political parties. The first publication in one of the papers was the 5th day of May. No question is made but that that publication was sufficient, but in the other paper the publication was made on the 6th day of May, falling one day short of two calendar weeks.

It is urged with a good deal of force that the statute does not contemplate the publication of such advertisement for two full calendar weeks, but merely two successive publications in two different weeks, and that if the advertisement is put in two different papers of the two leading political parties on two different occasions during two weeks, that that is a compliance with the law.

It is with some reluctance that we have reached a different interpretation of the statute. The statute requires the publication to be made for two consecutive weeks, and we have come to the conclusion that it means two full calendar weeks from the date of its first publication.

The statute does not direct whether the publication shall be made in a daily paper or a weekly, but does require that the publication shall be made for two consecutive weeks. No one can doubt the legality of the notice if published in a daily paper, but would it be a publication for two consecutive weeks if the notice were published on the last day of one week and the first of the next? Surely that is not what the statute contemplates, but that would be the effect of the construction claimed.

In the case of *Finlayson v. Peterson*, 33 L. R. A., 532, the court held:

“Under a statute requiring publication of notice of sale on foreclosure of mortgage by advertisement to be made for six successive weeks at least once in each week, the first publication must be made at least forty-two days before the sale or the foreclosure proceedings will be void.”

In the opinion the court says:

“The word ‘for’ in this statute means ‘throughout, or during the continuance of.’ Third Century Dictionary 2314, definition 15 of word ‘for.’ It is obvious that a notice of sale has not been published during the continuance of the week, when the day of sale follows the day of publication at an interval of less than a week.”

We think that that is the sense in which the words “for two consecutive weeks” are used in this statute, that is to say, during the continuance of two successive weeks. See also *Dever v. Cornwell*, 86 N. W., 297.

We must therefore hold that the requirement of the statute is not complied with. What is the effect of such non-compliance with the statute? In *McCloud v. City of Columbus*, 54 O. S., 439, the court says:

“Where a municipal corporation acting under Chapter IV, Division VII of Title IX, R. S., improves a public street, the provisions of Section 2303, prescribing the mode and time of advertising for bids are mandatory, the compliance with which is a condition precedent to the power of the municipality to enter into a valid agreement in respect thereof.”

The terms of the statute before us for construction are very similar to the terms of the statute before the Supreme Court in *McCloud v. Columbus*, and in view of that decision we think that the requirements of Section 1206, General Code, are mandatory, and a failure to comply with its terms renders the contract void.

POLLOCK, J., and FARR, J., concur.

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**MEASURE OF DAMAGES UNDER THE FEDERAL EMPLOYER'S
LIABILITY ACT.**

Court of Appeals for Huron County.

THE NEW YORK, CHICAGO & ST. LOUIS RAILWAY COMPANY V.
ALLEN G. AIGLER, ADMINISTRATOR OF THE ESTATE OF
PHILIP W. HASSELBACH, DECEASED.

Decided, October 12, 1917.

Negligence—Apportionment of, Under the Federal Employer's Liability Act.—Burden as to Contributory Negligence—Pecuniary Value of Care, Attention, Training and Advice of Parent—May be Assessed for Wrongful Death of Such Parent—Measure of Damages Where Decedent and His Wife were Living Apart.

1. In an action to recover damages for death by wrongful act, it is not error to charge the jury that they could take into consideration the care, attention, instruction, training, advice and guidance, if any, which the evidence shows the decedent reasonably might have been expected to give his children during their minority, and include the pecuniary value thereof in the damages assessed, if any.
2. Under the Federal Employers' Liability Act, where the negligence of the decedent contributed directly to his own death, the damages are to be diminished in proportion to the amount of negligence attributable to him as compared with the combined negligence of both employer and employee.
3. When the inference of contributory negligence does not arise from evidence offered by the plaintiff, the burden rests on the defendant to show the same by a preponderance of the evidence, and it is not established by evidence which only "equals in weight that offered by the plaintiff."
4. Where, in an action to recover damages for death by wrongful act, a judgment of \$16,500 has been rendered, and it appears from the evidence that the husband and wife had been living apart and a divorce suit was pending and that he was not voluntarily contributing to the support of the family, and the jury was not instructed as to the effect of these facts, and the amount of the judgment appears to be greater than the pecuniary loss suffered when these facts are given due weight, the judgment will be reversed unless the defendant in error will consent to a remittitur.

C. P. & R. D. Wickham, for plaintiff in error.

Allen G. Aigler, Jesse Vickery and Young & Young, contra.

RICHARDS, J.

This action was commenced for the purpose of recovering damages by reason of the death of Philip W. Hasselbach, who was an engineer in the employment of the defendant company and is claimed to have lost his life by reason of its negligence. The trial resulted in a verdict and judgment in favor of the plaintiff for \$16,500, and it is insisted that this judgment should be reversed because of errors in the admission of evidence and in the charge of the court, and because the verdict is not sustained by sufficient evidence and the amount of damages awarded is excessive.

The decedent lost his life in a collision which occurred in Fort Wayne, Indiana, on the evening of February 23, 1916. On that occasion he was running an engine attached to a freight train east on the main track and had just come from the West Fort Wayne yards proceeding on his way toward Bellevue. In the easterly part of the city a switch track, known as the south track, connects with the main track, and on this south track, just before the collision, a passenger engine to which was attached a baggage car was proceeding slowly east, the rate of speed being not more than two or three miles an hour. On the rear platform of this baggage car was a red light. The freight train attached to Hasselbach's engine was going at a rate of speed which is said by witnesses for the plaintiff to have been eight to ten miles an hour, and by witnesses for the defendant to have been about twenty miles per hour. The railroad company used automatic block signals through its yards and along its tracks in the city of Fort Wayne, and these signals indicated that the freight train on the main track had the right-of-way. Under these circumstances the employees operating the passenger engine on the south track ran their engine far enough into the switch so that it fouled the main track. As it did so the employee, known as the pilot, who was on that engine, alighted and walked over to the main track for the purpose of throwing

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the switch so that the passenger engine might proceed onto the main track. As he stepped onto the main track he discovered the approach of a train from the west, which was the freight train attached to the engine operated by Hasselbach. He immediately flagged that train and gave warning to the employees on the passenger engine. Hasselbach at once applied the emergency air brakes, and the engineer on the passenger engine attempted to back his engine so as to get beyond the fouling point, but these efforts were not sufficient to prevent a collision, resulting in the death of Hasselbach and also of the engineer operating the passenger engine.

It is conceded that the defendant company and the decedent, Philip W. Hasselbach, were at the time of the collision engaged in interstate commerce.

On the trial of the case the plaintiff introduced in evidence Rule 99 adopted by the company, providing, in substance, that when a train stops or is delayed under circumstances in which it may be overtaken by another train, the flagman must go back immediately with danger signals. This rule was received in evidence over the objection and exception of the company, the contention being that it had no application to the facts of this case. We are not able to see that this rule was competent evidence in the trial of the case. The pilot immediately on alighting and getting onto the main track discovered the approach of the freight train from the west, so that it was impossible to comply with that rule if applicable, and the omission to comply with the rule, under these circumstances, was not the cause of the collision. The negligent act of the company consisted in fouling the main track with one of its engines while a freight train on that track, having the right-of-way, was approaching within a very short distance and too near to avoid a collision. The rule referred to could not be intended to apply to a case where an engine was stopped momentarily for the purpose only of throwing a switch to enable it to proceed. Oral evidence was offered on this same subject and received over the objection and exception of the railroad company. The rule and the oral evidence relating thereto were not competent evidence and should

not have been received. It does not follow, however, that the reception of the evidence, while erroneous, was so prejudicial as to require a reversal of the judgment. We are not able to see how either the rule or the oral evidence prejudiced the rights of the railroad company. Whether the rules were obeyed or disobeyed, under the circumstances disclosed the collision would have happened, the proximate cause being, undoubtedly, the fact that the employees operating the passenger engine had driven the same so far that it fouled the main track, and without exercising ordinary care to see that no train was approaching, and while the signals indicated that the main track was clear for the freight train being drawn by Hasselbach's engine.

The facts shown by the record are not in very serious conflict and they establish the negligent conduct of the defendant company beyond question. It is urged that the decedent Hasselbach was guilty of contributory negligence in failing to observe and heed the red light on the rear of the baggage car on the south track and in operating his train in violation of the rule set forth in exhibit number two. That rule requires that second-class and inferior trains and yard engines in either direction between West Fort Wayne yard and the east end of Oliver House switch must move with great care, expecting to find passenger or switch engines occupying the main track, and will run at such speed that the train can be stopped where necessary. This latter rule was undoubtedly applicable to the train being drawn by Hasselbach's engine. It will, not, however, do to interpret the rule so rigidly as to require that he should operate his engine so as to be able to instantly stop the same. The rule must have a reasonable construction in view of what is practicable in the ordinary conduct of a railroad. If the jury believed the testimony offered by the plaintiff as to the speed at which the freight train was proceeding, which was, according to witnesses called by the plaintiff, eight to ten miles an hour, they would be justified in finding that the engineer was not violating the rule. A majority of the court are of the opinion that even if the speed had been as shown by the evidence of the defendant's witnesses, to-wit, twenty miles an hour, the jury would still have been

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justified in finding, if they had seen fit to do so, that Hasselbach was not guilty of contributory negligence under all the facts shown in this case.

The main track at the place where the collision occurred is on a curve and there is some doubt whether the red light on the rear of the baggage car would be visible to Hasselbach. Even if he saw the same moving slowly eastward, he would have been justified in assuming, in view of the fact that his train had the right-of-way on the main track, that the employees operating the engine hauling the car to which was attached the red light would not proceed so far as to interfere with the freight train. The existence of the red light, therefore, does not, in the judgment of the court, justify a finding of contributory negligence on the part of Hasselbach.

Exception was taken to the action of the trial judge in charging the jury, at the request of the plaintiff, before argument that they could take into consideration the care, attention, instruction, training, advice and guidance, if any, which the evidence shows Hasselbach reasonably might have been expected to give his children during their minority, and include the pecuniary value thereof in the damages assessed, if any. We find no error of the court in giving that instruction. Training, advice and guidance may reasonably have a pecuniary value and may therefore be taken into consideration in determining the amount of damages to be awarded. Almost the identical language is used by Mr. Justice McReynolds in delivering the opinion of the Supreme Court of the United States in the case of *N. & W. Ry. Co. v. Holbrook, Admx.*, 235 U. S., 625.

In charging the jury on the subject of comparative negligence the trial judge read the section of the federal employer's liability act governing this case and instructed them that contributory negligence, if found to exist, would not defeat or bar a recovery altogether, but that the damages should be diminished by the jury in proportion to the amount of negligence attributable to Hasselbach. This charge was in accordance with the rule fixed by the statute just mentioned, and is substantially in accordance with instructions approved in *N. & W. Ry. Co. v.*

Earnest, 229 U. S., 114, *Seaboard Air Line Railway v. Tilghman*, 237 U. S., 499, and *Illinois Central R. R. Co. v. Skaggs*, 240 U. S., 66. The true rule is summarized in the following language in 18 Ruling Case Law, 829:

“Under the statute it is not a question of majority of negligence, but rather one of proportion; and the damages are to be diminished in proportion to the amount of negligence attributed to the negligent employee as compared with the combined negligence of him and the employer. Or, as has been said by the Supreme Court, the damages recoverable bear ‘the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.’”

In applying, however, the language used in the passage quoted from Ruling Case Law it must be remembered that the words “negligent employee” used therein refer to the employee who is injured or killed.

The trial judge instructed the jury on the subject of contributory negligence, that where the inference of contributory negligence did not arise from evidence offered by the plaintiff, the burden rested on the defendant to show the same by a preponderance of the evidence “or by evidence which equals in weight that offered by the plaintiff.” Under the circumstances stated the burden would rest on the defendant to establish contributory negligence by a preponderance of the evidence, and it would not strictly be done by evidence which only equalled in weight that offered by the plaintiff. This error, however, could not in any sense be prejudicial to the railroad company.

We find no error in the charge to the prejudice of the defendant.

Counsel for the railroad company strenuously insist that the verdict of \$16,500 rendered in this case is excessive and wholly unwarranted by the evidence. Clearly the plaintiff was not entitled to recover more than the pecuniary loss which was suffered by the next of kin consisting of the widow and two children, aged ten and seven. The trial judge was careful to instruct the jury to limit the damages awarded to this pecuniary loss.

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Philip W. Hasselbach was thirty-seven years of age and in good health, but had no means except what was derived from his earnings amounting to about \$1,800 per year. He and his wife had separated some months before the fatal injury and had continued to live apart, and he had commenced an action to obtain a divorce from her. During that separation he made no provision, so far as the record shows, for the support of his wife or children except that there was some money in bank which she used. No payments were made by him for the maintenance of his family after this separation until he was threatened with an application for the allowance of temporary alimony, and thereafter he paid fifty dollars per month as temporary alimony. The record justifies the inference that this divorce case was pending at the time of his death and that the separation still continued. This evidence creates a situation that is very important in determining the pecuniary loss suffered by the next of kin by reason of the death of Philip W. Hasselbach. Certainly, with the litigation pending, it could not have been expected that he would pay more toward the support and maintenance of his family than should be required by the court, and they could not justly anticipate any larger sum than should be so fixed; whereas if the husband had continued to reside with his family and the relations were affectionate, they would undoubtedly have received greater pecuniary support and such considerate and parental advice and guidance as have pecuniary value. This unfortunate condition existing in the family was not called to the attention of the jury in the charge nor its bearings explained. We are forced to the conclusion, in view of the facts just recited, that the verdict is for a greater sum than represents the actual pecuniary loss sustained by the next of kin by reason of the death of Hasselbach. We find nothing in the record which would indicate that the result reached by the jury was based in any sense on passion or prejudice, but rather that they failed to take into consideration in assessing the pecuniary loss suffered by the next of kin, the domestic infelicity existing in the family and make due allowance therefor.

In view of this state of the record this court is of opinion that the verdict is excessive and that the defendant in error ought to be given an opportunity to remit from the verdict all in excess of the sum of twelve thousand dollars as of the date of the rendition of the verdict. Were it not for the feature of the case just mentioned, the verdict and judgment as returned and rendered would be affirmed by unanimous vote of this court.

Counsel for defendant in error cite a number of cases where judgments for greater sums than that awarded in this case have been sustained in actions brought to recover damages for death by wrongful act. An examination of those cases, however, discloses that they were not cases in which the comparative negligence doctrine was involved, nor were they cases in which there was a failure to take into consideration a class of evidence that would have tended to reduce the amount of damages awarded.

We have examined all the errors on which reliance is placed but find no others justifying separate mention.

If the defendant in error will consent to the remittitur as already stated, the judgment will be modified accordingly and as so modified will be affirmed; otherwise it will be reversed and the cause remanded for new trial.

CHITTENDEN, J., and KINKADE, J., concur.

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Mahoning County.

**CHARGING A COUNCILMAN WITH RECEIVING MONEY TO
INFLUENCE HIS VOTE.**

Court of Appeals for Mahoning County.

WILLIAM F. MEHLO V. STATE OF OHIO.

Decided, October 23, 1918.

Criminal Law—Duplicity—Can Not be Based on the Connecting of Different Alleged Acts by the Word “or,” When—Different Offenses Not Charged by Alleging Different Acts Which are Component Acts of the Same Offense—Examination of Jurors on Their Voir Dire.

1. An indictment which charges that the defendant, while acting as councilman of a municipal corporation, received money for the purpose of influencing his vote as such councilman with respect to, “An ordinance to authorize the Workman’s Transit Co., a corporation, to operate automobile bus lines over and along the public streets of the city of Youngstown aforesaid, or as to a matter that might legally come before him, the said Wm. F. Mehlo as such officer, and the said city council of which said Wm. F. Mehlo was a member as aforesaid, to-wit: an ordinance regulating the use of the public streets and thorofares of said city of Youngstown aforesaid,” is not bad for duplicity.
2. On the trial on an indictment charging the defendant, as member of the council of a municipal corporation, with bribery in receiving money to influence his vote as councilman, it is not error to permit the prosecuting attorney to inquire of a prospective juror whether he was acquainted with the other members of the same council who were charged with the same offense.

H. G. Bye and John Ruffalo, for plaintiff.

Paul Hausley, Prosecuting Attorney, contra.

METCALFE, J.

The defendant in this case, Wm. F. Mehlo, was indicted by the grand jury of Mahoning county upon a charge of bribery in receiving money to influence his official action while acting as a member of the city council of the city of Youngstown, in respect to a matter involving his official duty as such councilman.

The indictment charges that he received money as such councilman to influence his official action with respect to—

“An ordinance to authorize the Workman's Transit Co., a corporation to operate automobile buss lines over and along the public streets of the city of Youngstown, aforesaid, or as to a matter that might legally come before him, the said Wm. F. Mehlo as such officer, and the said city council of which said Wm. F. Mehlo was a member as aforesaid, to-wit, an ordinance regulating the use of the public streets and thoroughfares of said city of Youngstown aforesaid.”

It is objected to this indictment that it is bad for duplicity in that it charges the commission of two distinct and separate offenses, or that by the use of the disjunctive “or” he is misled to his prejudice in that he can not be informed by the indictment whether he is charged with being corruptly influenced with regard to the ordinance relating to the operation of automobile buss lines, or the ordinance regulating the use of the public streets of the city of Youngstown.

Bouvier's Law Dictionary defines “duplicity” as, “The union of more than one cause of action in one count in a writ, or more than one defense in one plea, or more than a single breach in the replication.”

Does this indictment charge two distinct and separate offenses? We think not. The gist of the offense charged in receiving a bribe to influence the conduct of the defendant as a member of the city council of the city of Youngstown with regard to his vote upon certain ordinances then pending before the city council. What difference does it make whether he accepted accepted money to vote upon two propositions or upon one proposition, or if he accepted money with the understanding that he should vote for or against one or the other?

If it should be agreed between the councilman and the party seeking to influence him that he should vote in a certain way upon one or the other of two separate ordinances pending it before the council leaving it to him to determine upon which one he would so vote, the indictment would charge that he was influenced to vote upon one on the other proposition or else it would not speak the truth.

It might be immaterial upon which one he voted corruptly, but, if he received money to influence his vote one or the other

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proposition he would receive it for the purpose of influencing his vote as a member of the council, and that is the offense charged in the indictment.

In *State v. Christmas*, 8th S. C., 361, the defendant was indicted on a charge of entering a house in the daytime under a section of a statute of North Carolina making such an offense a burglary. The court held:

“In an indictment under said section, the entering of a house with intent to commit a felony or other infamous crime therein,’ constitutes a gravamen of the charge, and hence a bill charging an intent to steal the goods, chattels, and money of T. B. Layman, and also with intent to steal the goods, chattels, and money of Mrs. Anna W. Layman, did not charge two different offenses.”

In *Ferrel v. State*, 24th Atlantic, 723, the Supreme Court of New Jersey held:

“1. The joinder of two or more distinct offenses in one count of an indictment is faulty, but where the acts complained of are component parts of the same offense, the pleading is not obnoxious to the charge of duplicity.

“2. The mere fact that two distinct charges appear upon the fact of the indictment does not necessarily render it vicious. If the several acts set forth enter into and constitute the principal offense, there is no charge of duplicity.”

And, in *Ohio v. Schultz*, 96 O. S., 114, our own Supreme Court following the case of *Hale v. State*, 58 O. S., 676, held—

“An indictment that charges in the same count, both receiving and concealing property, knowing the same to have been stolen, is not bad for duplicity.”

We think the indictment in this case sufficiently advises the defendant of the real charge against him, and to use the words of the court in *State v. Schultz*:

“Our courts today are not looking with favor upon petty defects and technical flaws in indictments so long as they do not affect the substantial rights of the parties to the action.”

It is further urged in this case that the court erred to the prejudice of the defendant in permitting the prosecuting attor-

ney, upon the examination of the jurors on their *voir dire* to inquire of the jurors whether they were acquainted with other members of the council of Youngstown who were under indictment charged with the same offense as the defendant. We think there was no error in this.

It is true, probably, that an examination along that line might be so conducted so as to be prejudicial, but, we think the state had a right to know whether or not a prospective juror was interested in other members of the council charged with the same offense. Such acquaintance or interest might have a tendency to influence him. The examination along that line was conducted with propriety, and we do not see how the defendant could have been prejudiced by it.

Many other interesting questions are presented in this record, but, we do not deem them of sufficient importance to warrant their publication.

Judgment affirmed.

POLLOCK, J., and FARR, J., concur.

DESCENT OF PERSONALTY LEFT BY A WIDOW.

Court of Appeals for Delaware County.

EDWIN M. PAUL ET AL V. FRANK BROWN ET AL.*

Decided, 1918.

Descent—Widow Taking Personality—Belonging to Her Intestate Husband Who Left Children Surviving—Does Not Take as Next of Kin—But Solely by Virtue of Section 8592—Distribution of Such Personality Upon Her Death Intestate.

Upon the death of a widow, intestate and without issue, personal property which came to her from her deceased husband, who also died intestate, does not pass to the children of said husband by a former marriage, but to her own brothers and sisters.

*Motion for an order directing the Court of Appeals to certify its record in this case overruled by the Supreme Court, November 12, 1918.

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Delaware County.

T. E. Powell, for plaintiffs in error.

Marriott, Freshwater & Wickham, contra.

POWELL, J.

Carey B. Paul, late of this county, died January 11, 1901, intestate. He left five children surviving him, and a widow, Sarah C. Paul. The five children were the children of a former marriage and were not the children of the widow, Sarah C. Paul. He left a large estate which passed, under the statutes of descent and distribution, to his widow and children in their statutory proportions.

Sarah C. Paul, the widow, died December 30, 1915, intestate and without issue, possessed of a large amount of personal property which came to her from her deceased husband on distribution of his estate.

Petitions were filed by four of the children of said Carey B. Paul, deceased, asking the direction of the court, to the effect that they are entitled to the share of the estate of said Sarah C. Paul, deceased, for distribution, which came to her from her former deceased husband, their father.

One of said children, Frank C. Paul, did not join as plaintiff and was made defendant to the action. The issue was made up by the filing of an amended petition, the answer thereto of the defendants, Frank Brown and Anne E. Carpenter, and F. M. Marriott as special administrator of the estate of said Sarah C. Paul, deceased, and the reply thereto of the plaintiffs. The case was submitted to the court of common pleas upon the admissions of fact contained in the pleadings, and upon such submission a judgment was entered in favor of the defendants. Motion for a new trial was filed and overruled. A petition in error was filed in this court with a transcript of the proceedings had in the court of common pleas.

The question presented for adjudication is as to how such property in the possession of said Sarah C. Paul should be distributed under the statutes of descent and distribution. The claim of the children of Carey B. Paul is that the distribution of such property as Sarah C. Paul owned at the time of her death,

that came to her from the estate of Carey B. Paul, passes and descends under the provisions of Section 8577 of the General Code to the five children of the said Carey B. Paul in equal proportions; while the defendants, Frank Brown and Anne E. Carpenter, as brother and sister of the said Sarah C. Paul, and the defendant, F. M. Marriott, as administrator of her estate, claim that the entire personal estate of the said Sarah C. Paul passes and descends to the said Frank Brown and Anne E. Carpenter as her next of kin, without reference to the source from which such property came to her, under the provisions of Section 8578 of the General Code, which by reference requires all property that passes by virtue of said section to be distributed according to the classification prescribed by Section 8574, but subject, "however, to such right as a widow or widower may have to any part of such personal property."

So much of Section 8577, as is applicable to the question here involved reads as follows:

"Section 8577. When the relict of a deceased husband or wife dies intestate and without issue, possessed of any real estate or personal property which came to such intestate from a former husband or wife by deed or gift, devise or bequest, or under the provisions of section eighty-five hundred and seventy-four, then such estate, real and personal, shall pass to and vest in the children of such deceased husband, or wife, or the legal representatives of such children."

Section 8578, or so much thereof as is applicable to this case, reads as follows:

"Section 8578. When a person dies intestate and leaves personal property, it shall be distributed in the manner prescribed in section eighty-five hundred and seventy-four, as to real property which came not by descent, devise or deed of gift from an ancestor; saving, however, such right as a widow or widower may have to any part of such personal property."

Applying the provisions of Section 8577 to the case now under discussion, we have:

1. Sarah C. Paul is the relict of a deceased husband, Carey B. Paul, both dying intestate and without issue.

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2. She was possessed of a large amount of money and other personal property which came to her from such former deceased husband under the statutes of descent and distribution.

3. "Such estate, real and personal, shall pass to and vest in the children of such deceased husband, or the legal representatives of such children," if the same came to her from her deceased husband's estate "by deed of gift, devise or bequest, or under the provisions of section eighty-five hundred and seventy-four."

It is contended in the briefs of counsel that said Sarah C. Paul did not come into possession of said money by deed of gift, devise or bequest, or under the provisions of Section 8574, therefore the provisions of Section 8577 do not apply. By Section 8578 of the General Code the title to personal property of an intestate passes on distribution of his estate, by the course of descent prescribed by Section 8574, subject, however, to such right as a widow or widower may have in the personal property of such decedent. This would include any right which a widow or widower would have in the personal property of the deceased consort. This saving clause would indicate that a widow or widower, relict of a former deceased husband or wife, has other rights in the personal property of such deceased consort than are to be found in Sections 8578 and 8574, and that a widow's rights as defined by these two sections are such other rights as are exempted from the operation of said two sections. By Section 8574, a widow, relict of a deceased husband, is entitled to all the personal property of said deceased husband for distribution if there are no children or legal representatives of children of such deceased husband. This is the only provision made by Section 8574 for the benefit of such widow, and it is the opinion of the court that this is the provision to which reference is made in Section 8577 as to property which came to such intestate under the provisions of said Section 8574.

In such case, too, where the widow or widower takes the whole estate of such intestate by virtue of Section 8574, she takes it as next of kin of such intestate (Section 8592, General Code). When there are children surviving, the widow does not take as next of kin. Such children are next of kin of such intestate and take

the whole of the personal property to the exclusion of the widow, so far as the independent provisions of Section 8574 are concerned, but they take it even under said section subject to such other rights as the widow may have by other provisions of the statute. By virtue of Section 8592, the widow takes as next of kin of her deceased husband all the personal property subject to distribution on settlement of the estate, provided there are no children of such intestate surviving. This is the same provision that is made for her by Section 8574. But Section 8592 goes further and prescribes what she shall have if her deceased husband left children surviving him. In such event she is "entitled to one-half of the first four hundred dollars and to one-third of the remainder of the personal property subject to distribution." As said above she does not take this share as next of kin, but is entitled to it, as we think, solely by operation of said statute Section 8592. *Doyle v. Doyle, Jr.*, 50 Ohio St., 330.

Her title to the property sought to be recovered in this action is a title solely by virtue of this statute and as a consequence resulting therefrom it does not descend or pass from her on distribution of her estate under the direction of Section 8577, but does pass and descend under the provisions of Sections 8578 and 8574 as directed by said Section 8578.

It follows, therefore, that as the property in her possession at her death, which came to her from her deceased husband, did not come to her by deed of gift, devise or bequest, or under the provisions of Section 8574, it does not pass on distribution of her estate, under Section 8577, but does pass generally under Sections 8578, 8574 and 8592.

The judgment of the court of common pleas directing the distribution of said estate to the said defendants, Frank Brown and Anne E. Carpenter, as the brother and sister of said decedent, and to her administrator, was the proper judgment and decree to have been entered and should be affirmed by a reviewing court.

Judgment affirmed.

HOUCK, J., and SHIELDS, J., concur.

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Licking County.

RESPONSIBILITY OF MOTORMAN FOR STRIKING ONE ATTEMPTING TO CROSS THE TRACK BEFORE HIM.

Court of Appeals for Licking County.

GEORGE R. TAYLOR, ADMINISTRATOR OF THE ESTATE OF MARTHA B. TAYLOR, DECEASED, v. THE OHIO ELECTRIC RAILWAY COMPANY.*

Decided, October Term, 1918.

Negligence—Woman Killed While Crossing Interurban Track in Open Country—Motorman Charged With Ordinary Care Only—Charge of Court—Last Chance.

1. A motorman on an interurban car can not be held responsible under an inexorable rule and as a matter of absolute duty to discover under any and all circumstances the presence of persons on or near the track before him who may be struck by his car, and where he maintained as vigilant a lookout as was consistent with the paramount duty which he owed to the passengers in his charge, he can not be held responsible for failing to discover what he did not and could not see by the exercise of ordinary care.
2. A charge of court which holds a motorman responsible for failure to see a person on the company's right-of-way in time to avoid injuring him, is too broad and to refuse to give it to the jury is not error.
3. Inconsistent charges do not constitute ground for reversal unless they are prejudicial and relate to matter which is material, and where it is reasonably certain that the charges given did not come within this rule, ground is not afforded for setting aside a verdict which otherwise ought not to be disturbed.
4. Where one having an unobstructed view of a car approaching at high speed misjudges the time required for the car to pass him and in attempting to cross in front of it is struck and killed, a verdict in favor of the company will not be set aside on the ground of the weight of the evidence.

Kibler & Kibler, for plaintiff in error.

J. R. Fitzgibbon and Montgomery & Black, contra.

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court February 11, 1919.

SHIELDS, J.

In this proceeding it is sought to reverse the judgment of the court of common pleas because of certain alleged errors occurring upon the trial of said action in said court, as appears in a petition in error filed in this court for such reversal.

In said action a recovery in damages was sought by the plaintiff in error as plaintiff against the defendant in error as defendant for the death of Martha B. Taylor on the 25th day of May, 1915, caused by the alleged negligence of the defendant in error, the facts and circumstances of which are referred to in this opinion.

The defendant by answer admitted that the said decedent was struck by one of its cars and instantly killed at the time and place mentioned, but it denied the negligence charged and averred contributory negligence, which was denied by the plaintiff in his reply.

A verdict and judgment was recovered by the defendant company below.

While the petition in error alleges some thirteen separate grounds of error, three grounds only were argued to this court, namely:

1. The refusal of the court below to charge the jury before argument as requested by the plaintiff below.
2. Error in said court's charge to the jury.
3. That the verdict was manifestly against the weight of the evidence.

It appears that the decedent who before and up to the day of her death resided in Newark, Ohio, had left her home on said day to visit at the home of one John Fullerton, near Hebron, in said county, where a friend of hers had just died, and where other friends of the deceased friend were also gathered. The Fullerton home was located near the defendant company's line of road, perhaps some thirty or forty feet from its tracks, where there was a signal stop known as "The Oak Stop," and where persons at the Fullerton home boarding the defendant company's cars, going north, were obliged to cross the two tracks of said company at a distance of some fifty feet from said home. The customary signal to the passing cars to stop for passengers

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awaiting passage was given by the waiving or throwing up of the hands or other like means. On the day in question it appears that the decedent desired to return to her home in the early evening of said day and being informed that a car was approaching, which could be seen at a considerable distance on a straight track from the Fullerton home, she hurriedly arose from the table where she was eating and signaling the motorman of the car with her hands, and perhaps a handkerchief, with an accompanying friend, while in the yard of the Fullerton home, she hastened to cross the defendant company's tracks in plain sight of and within a short distance of a rapidly approaching car to reach the opposite side to board the same, and in the attempt to do so she was struck and killed by one of the defendant's cars, which was then running at the rate of thirty-five or forty miles per hour. As in other like cases the eye witnesses to the tragic end of the decedent in this case differ in some of the particulars of the accident, some testifying that the decedent was warned against the danger of crossing the tracks at that time in the face of the fast approaching car, which could readily be seen before she attempted to cross, and that she was running across the tracks when struck when the car was about two hundred feet distant from her, while others testify to a different state of facts.

Upon an examination of the testimony given upon the trial on this branch of the case, if we were sitting as a jury to judge of the effect of this testimony, we would feel compelled to find that death resulted from a mistaken judgment based upon a miscalculation of the speed of the car, a conclusion reached by the jury, perhaps, as evidenced by their verdict. In this connection it might be remarked that it is a matter of common knowledge, emphasized by the daily record of accidents happening upon railroads and from the operation of automobiles upon the public highways, that many such accidents are due to a misconception of the extent of space traveled by such vehicles in an incredibly short period of time, and as a result accidents follow. Here it is admitted that the car in question was traveling at the rate of from thirty-five to forty miles per hour; hence it is apparent that a person about to cross the track of said company to take

passage on the car from the opposite side would be required to so cross at a considerable distance in advance of such approaching car in order to cross safely and to avoid accident. But contributory negligence, when the evidence is conflicting, is a question of fact for the jury, and leaving this feature of the case, counsel for plaintiff in error argued that although the decedent may have been primarily negligent, the petition presents a case on which the plaintiff in error claims he was entitled to have certain propositions of law submitted to the jury before argument, which the court refused to give. Here the issue of what is known as the "last chance" is claimed to be raised by the averments in plaintiff's third amended petition and, as claimed, was supported by the evidence, and it is urged that the court below erred in refusing to give to the jury in charge several requests containing certain propositions of law submitted on behalf of the plaintiff in error before argument in relation to such issue. In *Drown v. Traction Co.*, 76 O. S., at page 249, the judge announcing the opinion in that case, among other things, says:

"It is clear, then, that the 'last chance' rule should not be given as a hit or miss rule in every case including negligence. It should be given with discrimination."

The doctrine of "last chance" in the evolution of modern jurisprudence, as defined by modern text-writers and interpreted by courts, seems to extend the long recognized rule as to the effect of combined contributory and concurrent negligence, and affords a right of action in damages to the injured person, although primarily negligent, if the defendant after discovering, or by the exercise of ordinary care could have discovered, the danger of such person and fails to use such care to avoid injuring such person. This view contemplates that the act of negligence of the injured party was not heedless or wilful, for certain it is that the law does not place a premium upon one's own wanton or rash act and cast upon another the responsibility of such act, but while such negligence creates the condition of danger, the law permits a recovery in damages for the subsequent negligence of a defendant causing such injury after becoming aware, or in the

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exercise of ordinary care could have become aware, of such danger.

Of the eight requests submitted on behalf of the plaintiff in error to be given in charge to the jury before argument, Nos. 4, 5, 7 and 8 were so given and Nos. 1, 2, 3 and 6 were refused.

Request No. 1 was as follows:

“The court charges you that the plaintiff can recover in this case, notwithstanding the decedent may have been guilty of negligence in crossing in front of the moving car, if the motor-man, after he became aware, or ought to have become aware, of her position, failed to use ordinary care to avoid injuring her.”

In their brief, counsel for plaintiff in error cite as authority for such instruction: *Railroad Co. v. Kassen*, 49 O. S., 230; *Erie Railroad Co. v. McCormick, Admx.*, 69 O. S., 45; *Drown v. Traction Co.*, 76 O. S. 234; *Traction Co. v. Brandon, Admr.*, 87 O. S., 187; *West, Receiver, v. Gillette, Admr.*, 95 O. S., 305.

In *Railroad Co. v. Kassen*, cited, the court announced the rule that:

“It is a well settled rule of the law of negligence, that the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of the injury of which he complains, if the defendant, after he became aware, or ought to have become aware, of the plaintiff's danger, failed to use ordinary care to avoid injuring him, and he was thereby injured.”

In the case of *Erie Railroad Company v. McCormick, Admx.*, cited, the court laid down the following rule:

“In an action against a railroad company by one who, by his own fault is upon its track and in a place of danger, to recover for a personal injury caused by the failure of its employees operating one of its trains to exercise due care after knowledge of his peril, it is necessary to show actual knowledge imputable to the company. *Railroad Co. v. Kassen*, 49 Ohio St., 230, distinguished.”

In *Drown v. Traction Co.*, cited, it was held that:

“The doctrine of ‘last chance,’ as formulated in *Railroad Co. v. Kassen*, 49 Ohio St., 230, paragraph one of syllabus, does not

apply where the plaintiff has been negligent, and his negligence continues, and, concurrently with the negligence of defendant, directly contributes to produce the injury; it applies only where there is negligence of the defendant subsequent to, and not contemporaneous with, negligence by the plaintiff so that the negligence of defendant is clearly the proximate cause of the injury and that of the plaintiff the remote cause."

In *Traction Co. v. Brandon, Admr.*, cited, the third syllabus reads as follows:

"Where the motorman of a street car being operated on a public street in a much frequented part of a city, discovers, or by the exercise of ordinary care and watchfulness should discover, that the driver of a smaller vehicle is about to cross the track at a street crossing, in front of such car, it is the motorman's duty to use ordinary vigilance to stop or check the car in order to avoid collision; and the fact that such driver may have omitted to look for the approach of the car will not, as matter of law, defeat his right to recover for injury from a collision with such car if the motorman has not used such vigilance."

In *West, Receiver, v. Gillette, Admr.*, the court held that:

"Where a collision occurs and such driver is injured and the undisputed evidence shows that the motorman actually saw such vehicle and had it continually in view for a considerable distance from the crossing, it is for the jury to determine whether he exercised such vigilance and care in the circumstances; and the fact that the driver may have been originally negligent in the manner of going on the crossing will not, as matter of law, defeat his right to recover for the injury, if the motorman has not used such vigilance after discovering him."

Of course, the rule of law announced in each of the foregoing cases was intended to apply to the particular facts in such cases. While the last three were crossing cases, the facts in each case were essentially different. Without taking time to discuss the history of these cases or the principles of law laid down therein, we are not persuaded that the Supreme Court of this state has as yet announced the doctrine contended for by the plaintiff in error, as embraced in said request No. 1. As we read them, the

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last three cases cited do not bear out the construction contended for, certainly not in the last case, for there the motorman in charge of the car actually saw the horse and buggy several hundred feet before the impact at the crossing, which fact eliminated from that case the question of vigilance enjoined by the law upon a railroad company with a view to discover persons exposed to danger at a highway crossing. Nowhere in the cases cited do we find that the court has held it to be an inexorable rule and as a matter of absolute duty that a motorman shall be held to accountability under any and all circumstances for failing to discover that which in the exercise of ordinary care he did not and could not discover, or as stated in said request "or ought to have become aware of." True, this language was used in the Kassen case referred to, but Judge Shauck in announcing the opinion in the McCormick case in reviewing the Kassen case on page 54 says:

"The phrase 'ought to have been aware' manifestly applies to those in charge of the following train, and implies the duty of the company to communicate to them its actual knowledge of Kassen's danger. * * * It is entirely clear, therefore, that the liability of the company was placed upon the sole ground that after receiving actual notice that Kassen was upon the track and in a position of peril, it failed to use the means at hand to avoid injury to him. The doctrine of the case can have no application when neither the company nor its employes operating the train by which the injury is inflicted may be charged with actual knowledge. The rule of liability applies only when there is actual knowledge of those operating the train inflicting the injury, which knowledge is imputed to the company derived through other means, with opportunity to communicate it to those operating the train. By introducing into the instruction given the phrase, 'if the engineer in charge of the train ought, by the exercise of ordinary care, to have seen the deceased in his perilous position,' and by other expressions in the charge involving the same conception, the court gave to the jury an erroneous view of the law."

It appears that the foregoing opinion was concurred in by Judge Spear who announced the opinion in the case of *Traction*

Co. v. Brandon, Admr., and by Judge Davis who announced the opinion in the case of *Drown v. Traction Co.*, referred to.

In the opinions announced in both the *Drown v. Traction Co.* and *West, Recr., v. Gillette, Admr.*, cases the following text from Vol. 2, Thompson on Negligence, Section 1629 was cited with approval:

“Although a person comes upon the track negligently, yet if the servants of the railway company, after they see his danger, can avoid injuring him, they are bound to do so. And, according to the better view with reference to injuries to travelers at highway crossings—as distinguished from injuries to trespassers and bare licensees upon railway tracks at places where they have no legal rights to be—the servants of the railway company are bound to keep a vigilant lookout in front of advancing engines or trains, to the end of discovering persons exposed to danger on highway crossings; and the railway company will be liable for running over them if, by maintaining such a lookout and by using reasonable care and exertion to check or stop its train, it could avoid injury to them.”

As here stated, “the servants of the railway company are bound to keep a vigilant lookout,” but where such vigilance has been exercised by the motorman consistent with his paramount duty owing to passengers in his charge, as held in the Kistler case, 66 O. S., 326-337, has not the duty imposed by the law upon him been discharged? Opportunity to know may not be knowledge. Without pursuing this subject further we think that the epitome of the law on this subject is correctly and concretely stated in Thompson on Negligence, referred to, which was approved by Judge Johnson in the case of *West, Rec'r, v. Gillette, Admr.*, as being “well founded in reason and authority.”

As each case rests upon its own facts, let us inquire what the facts were on this branch of the case as shown by the record in the case at bar. As stated, “Oak Stop” was a signal stop in the open country where the defendant company's cars stopped on signal. While the failure of the motorman to give a signal or to reduce the speed of the car at said signal stop are alleged in the plaintiff's said amended petition as contributing causes

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to said decedent's death, the failure of the motorman to discover the presence of the decedent at or about said stop was specifically urged in argument as the proximate cause of said death. Passing the circumstances under which the decedent undertook to cross the tracks from the Fullerton home, to which we have already referred, it appears that in running from Buckeye Lake to Oak Stop the car was running at the rapid rate mentioned, and it appears that C. T. Hayden, the motorman in charge of said car, testified as follows:

"Do you remember about what time the accident occurred?
A. It was in the evening but I don't remember the time.

Q. Where were you coming from with your car. A. Buckeye Lake.

Q. Where did you first see Mrs. Taylor? A. Well, she was coming through the little gate by the road crossing.

Q. At that time how far was the car from the crossing, to the best of your knowledge? A. One hundred and fifty to two hundred feet.

Q. Now, I wish you would state fully and in detail what you did when you saw Mrs. Taylor at the gate, or coming through the gate. A. I blew the whistle, shut off the power and reversed the car.

Q. What did Mrs. Taylor do? A. Well, I don't remember.

Q. Was there any one in the compartment where you were at that time? A. Not to my knowledge.

Q. Did you see the car strike Mrs. Taylor? A. Positively not.

Q. How far did the car run beyond the crossing after Mrs. Taylor was struck? A. Between two hundred and fifty and three hundred feet.

Q. That is, before it came to a stop? A. Yes, sir.

* * * *

Q. Are you employed by the Ohio Electric at this time?

A. No, sir.

Cross-examination.

* * * *

Q. Who was your conductor? A. W. H. Smith.

Q. Wasn't he in the vestibule with you? A. No, sir.

Q. Isn't it a fact that from the trestle to the point where

you struck Mrs. Taylor, you were talking with some one in that vestibule the whole way from the trestle? A. Positively not.

"Q. When you approached this crossing did you intend to stop there? A. I didn't see any one that wanted on until we were within a hundred and fifty or two hundred feet.

"Q. You didn't intend to stop? A. There was nobody flagging.

"Q. Because there was nobody there, flagging you, you didn't intend to stop as you came there? A. No.

"Q. Did you see any one waiving about that gate on the left hand side of the track the direction you were coming? A. I didn't. She was running somewhere through the gate when I first seen her.

"Q. My question is, did you see any one waiving to you standing in the neighborhood of that gate as you approached that crossing? A. I did not.

"Q. Did you see any one at or near the gate at the time you saw Mrs. Taylor? A. I don't remember of seeing any one.

"Q. Does that mean that you didn't or did? A. I didn't.

"Q. And at no time before you got to within a hundred and fifty or two hundred feet of that crossing did you see any signal? A. I did not.

"Q. Now, as you approached that crossing, were you in your proper place? A. Yes, sir.

"Q. And you claim you kept a proper lookout? A. I did.

"Q. And yet you didn't see Mrs. Taylor, or any other woman. A. I did not.

"Q. Now, when you saw Mrs. Taylor, what did you do? A. I shut off the power.

"Q. Why? A. She was running toward the car.

"Q. You had no signal from her? A. I didn't see any.

"Q. And of course you didn't in that 150 or 200 feet—you didn't slacken the speed much before you got to the crossing? A. I couldn't say how much it was slackened.

"Q. You shut off the power? A. Shut off the power and reversed the motor.

"Q. Now, Mr. Hayden, there was nothing to prevent your view of this track at any time after you crossed the trestle? A. A misty rain on the windows.

"Q. Didn't you have the windows opened? A. I did not.

"Q. How do you know? Do you remember that fact? A. The windows can't be opened.

"Q. So, your view was obstructed, was it? A. To a certain extent.

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“Q. Was it raining at the time of the accident? A. Just a misting rain.

“Q. How long had it been raining? A. Before we left Buckeye Lake.

“Q. Now, Mr. Hayden, when you first saw Mrs. Taylor she was to the left of the gate as you approached? A. Yes, sir.

“Q. Did you see anything like a handkerchief in her hand? A. I did not.”

During the trial one Leonard Hoskinson, a witness for the plaintiff, testified that he was sitting in a certain seat in the car where he could see and did see the motorman and conductor talking together in the front vestibule of the car, at some little distance from the scene and immediately before the time of the accident, and that the motorman looked behind him at times during such talk, as tending to show that he was not engaged in keeping a vigilant lookout in front of the car; but other witnesses in addition to the motorman and conductor testified that the said Hoskinson did not occupy the seat in said car as claimed by him, and that the motorman and conductor were not so engaged in conversation at said time, whose testimony appears to have been believed and accepted by the jury as the true and correct statement of this disputed fact.

Request No. 2 reads as follows:

“The Court charges you that if the motorman saw Mrs. Taylor upon the company’s right of way, or could by the exercise of ordinary care have seen Mrs. Taylor in said position in time to have slackened his speed or stopped his car and avoid the injury, then your verdict should be for the plaintiff.”

This request is open to the objection that it extends the range of vision of the motorman to the company’s right of way. It was said in argument, and not disputed, that said company’s right of way at this point was over forty feet. The presence of one on such right of way, if seen, would rather repel than raise the presumption that such person would go upon the company’s tracks in the face of a rapidly approaching car at high speed. As was said by Judge Burket in announcing the opinion in the Kistner case, 66 O. S., 326-336:

"It is the duty of an engineer on a train to keep a lookout on the track ahead of him, and he is not expected to see anything on the sides of the right of way farther than his eye may take in objects within the range of vision while looking ahead along the track," citing *Railroad Co. v. Elliott*, 4 O. S., 474, 476, and other authorities.

The principle here announced, applicable to an engineer on a locomotive, is alike applicable to a motorman operating an interurban car. The request, as a proposition entire, was too broad in its statement and was therefore properly refused.

Request No. 3 was properly refused for the same reason as was request No. 2.

Requests Nos. 4 and 5 were given as requested.

Request No. 6 was properly refused for the same reason as request No. 1.

It was also urged that the court below erred in its general charge to the jury, and our attention was specially called to what are claimed to be inconsistent instructions on the subject of contributory negligence and to the speed of interurban cars in the open country. After giving request No. 5 on behalf of the plaintiff in error as appears on page 362 of the record, it was contended that the court afterward gave another and a contrary instruction on behalf of the defendant in error, which is as follows:

"If you find that the decedent Martha Taylor was negligent, and that the defendant was negligent, and that the negligence of both was contemporaneous and continuing until *after* the injury, and that the negligence of each was a direct cause of the injury without which it would not have occurred, the plaintiff may not recover and your verdict should be for the defendant."

The charge proceeded upon the theory that the petition and evidence presented a case involving the issue of the "last chance." The reasoning adopted by Judge Davis in announcing the opinion in the case of *Drown v. Traction Co.*, that—

"If the plaintiff and the defendant both be negligent and the negligence of both be concurrent and directly contributing to

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produce the accident, then the case is one of contributory negligence pure and simple. But if the plaintiff's negligence merely put him in the place of danger and stopped there, not actively continuing until the moment of the accident, and the defendant either knew of his danger, or by the exercise of such diligence as the law imposes on him would have known it, then, if the plaintiff's negligence did not concurrently combine with defendant's negligence to produce the injury, the defendant's negligence is the proximate cause of the injury and that of the plaintiff is a remote cause,"

seems to have been followed in framing said request so far as it applied to the question of contributory negligence. So far as it goes, we see nothing wrong in this instruction, but it is objected to because it does not include the qualifications of the "last chance" rule, which nullifies the defense of contributory negligence in a proper case. True, this might have been given under the issue raised by the pleadings in the case, as claimed by the plaintiff in error, but it was a request submitted by the defendant in error, and yet the court in its general charge instructed the jury in accordance with the instruction given in said request number five, submitted by the plaintiff in error. To constitute ground of reversal where inconsistent charges have been given, they must be to a material matter and prejudicial. Here it cannot be said that the subject-matter of the instruction was not material, but was it misleading and prejudicial in view of the instruction given in said request number five and the same instruction in substance repeated in the general charge? We do not think it was, but even assuming that it was, we think that the verdict and judgment below was right and that said judgment ought not to be disturbed on this account. *Way & Co. v. Langley*, 15 O. S., 392; *Banning v. Banning*, 12 O. S., 437.

It was objected also that the following instruction as the same appears on page 365 in the record, given on behalf of the defendant in error, was inconsistent with request No. 4, given on behalf of the plaintiff in error on page 364:

"It is not negligence for the defendant to run its car on its own right of way in the open country at a high rate of speed."

It is contended that this instruction is contrary to a holding made by the Supreme Court in the Kistler case referred to. The instruction contained in said request appears to be general and as such it appears to be in harmony with the proposition laid down in the third syllabus of said case. A different rule would apply in a case where the motorman of a car discovered, or in the exercise of ordinary care in keeping a proper lookout could discover, a person at a public crossing or at a customary stopping place. We fail to find any ground of reversible error in this respect.

It was also urged that the verdict of the jury was against the manifest weight of the evidence. Because of the loss of a life we have been led to carefully read and examine this record, not in the hope of finding error against the defendant in error that would authorize us as a reviewing court to set aside the verdict, but to ascertain whether or not the decedent's legal representative had a fair trial under the forms of law provided in such cases. Accidents by violent death usually evoke sympathy, and such undoubtedly was the natural feeling shared by the jury under a recital of this tragic occurrence, but sympathy has no place in the administration of the law, and under the evidence presented in this case, under the instructions of the court, we are of the unanimous opinion that the verdict of the jury was a proper and just one. As we read this record, the decedent, with a full and unobstructed view of an approaching car running at a high rate of speed, attempted to hastily cross the tracks of the defendant in error at an unsafe and dangerous distance from said car, and not being discovered by the motorman in time to check its speed to protect her from injury, she was struck and killed by said car. Unsympathetic and uncharitable though it may seem, the law affords no reparation in such cases.

Judgment affirmed.

POWELL, J., and HOUCK, J., concur.

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Jefferson County.

ILLEGAL SUSPENSION OF A CIVIL SERVICE EMPLOYEE.

Court of Appeals for Jefferson County.

CITY OF STEUBENVILLE V. HENRY BOUGHER.

Decided, December Term, 1916.

Civil Service—Sealer of Weights and Measures May Not be Removed for Lack of Funds to Pay Him—Authority of the Director of Public Service.

1. Where a sealer of weights and measures has been appointed by the mayor of a municipal corporation, such officer is subject to the rules of the civil service, and can only be suspended or removed in accordance with the provisions of the civil service act. 105, 106 O. L., 411.
2. Said act does not permit a removal or suspension of such officer by reason of a shortage of funds to pay his salary.
3. The director of public service has no authority to make such suspension or removal.

F. E. Morrow, for plaintiff in error.

C. L. Williams, contra.

METCALFE, J.

The defendant in error was appointed sealer of weights and measures of the city of Steubenville by the mayor of that city, and as such appointee he is subject to the regulations of the civil service act. 105-106 O. L., 411.

A shortage of funds with which to pay his and other salaries occurred in the city treasury, and alleging such shortage as a reason for his action the director of public service issued an order suspending Mr. Bougher from his office indefinitely.

This action was brought by Mr. Bougher to recover his salary, and it is contended that he could only be suspended or removed in accordance with the regulations of the civil service act, and, that in any event, the director of public service had no power to suspend or remove him.

Section 486-17 of the civil service act, *supra*, provides:

“In cases of reduction, lay-off or suspension of an employee or subordinate, whether appointed for a definite term or otherwise, the appointing authority shall furnish such employee or subordinate with a copy of the order of lay-off, reduction or suspension and his reasons for the same, and give such employee or subordinate a reasonable time in which to make and file an explanation.”

The appointing authority in the case of the defendant in error is the mayor, and the appointment appears to have been legally made by such officer; hence the provisions above cited applies to him, and hence he could not be arbitrarily suspended indefinitely for any reason, but has the right to an explanation of any charge made against him and to a trial in accordance with the further provisions of the act.

We find no provision in the act authorizing or permitting the suspension of an officer or employee for the reason that there is a shortage of funds in the treasury. The appointing and removing power resting in the mayor it follows that the action of the director of public service was a usurpation of such power and his action absolutely void.

Judgment affirmed.

POLLOCK, J., and FARR, J., concur.

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Hamilton County.

REMAINDER VESTED IN FEE SIMPLE IN THREE SONS.

Court of Appeals for Hamilton County.

WILLIAM A. STARK, TRUSTEE, v. CHARLES E. MARSH ET AL.*

Decided, April 15, 1918.

Wills—Alternative Clause of Survivorship Having Become Inoperative—The Remainder Vested in the Sons Named—Notwithstanding They Were Survived by the Life Tenant.

1. A died leaving a will, giving a life estate to a daughter and granddaughter and then provided, "the remainder in the portions thus devised to my daughter and grand-daughter shall at their respective deaths vest in the lawful issue of their respective bodies and in default of said issue, then the same shall descend to and vest in my said three grandsons, sons of my son Augustus, the survivor or survivors of them."
2. At the death of the testator the daughter was unmarried and so remained until her death; the three sons of Augustus were all alive at the death of the testator and all died prior to the death of the life tenant.
- Held:* That at the death of the testator the daughter took an interest for life in the estate devised and the remainder vested in the three sons of Augustus, subject to be divested by the life tenant leaving children or the condition of survivorship existing among the three sons of Augustus at the death of the life tenant.
3. As the life tenant never married and the condition of survivorship did not exist at the death of the life tenant the estate that had vested in the three sons of Augustus at the death of the testator was never divested, notwithstanding the fact that all three sons died prior to the life tenant.

Robt. A. Taft, for appellant.

W. S. Little and Louis N. Gatch, for plaintiff.

W. F. Fox, for Edna and Eva Marsh.

Owen N. Kinney, for Blanche Marsh Salway and Chas E. Marsh.

*Motion for an order directing the Court of Appeals to certify its record in this case overruled by the Supreme Court, November 12, 1918.

JONES, J.

This is an action brought by the trustee under the will of Elbert Marsh, for the construction of said will. It was heard in this court on appeal taken by Ida Hamilton Roberts, granddaughter of said testator, from the decision of the court of common pleas.

A fund of about thirteen thousand dollars, concerning the distribution of which this controversy relates, represents the proceeds of the sale of one-third of testator's real estate, devised for life to his daughter Martha E. Marsh, who received the income thereof until the date of her death in December, 1915, at the age of eighty-one years.

Testator's will was executed August 11, 1872, and he died in March, 1878, leaving three living children, Martha E. Marsh, Augustus W. Marsh and Charles E. Marsh; and four grandchildren, Charles A., William H. and Edward E. Marsh, children of his son Augustus W. Marsh; and Ida Hamilton, who afterwards by marriage became Ida Hamilton Roberts and who was the only child of a deceased daughter, and is the appellant in this case.

At the time of the making of the will Martha E. Marsh was forty-two years of age and unmarried. The three sons of August were none of them at that time more than fifteen years of age; they all died prior to the death of Martha E. Marsh, as follows: Edward, January 15, 1899; William, May 9, 1910; and Charles A., September 6, 1910. Edward left two children; Edna Marsh and Eva Marsh Ford. Charles A., left two children: Charles E. Marsh and Blanche M. Salway. And William died childless. Martha E. Marsh never married and died without issue.

The clause requiring construction is found in the fifth item of the will, as follows:

“ * * * The remainder in the portions thus devised to my daughter and granddaughter, shall at their respective deaths, vest in the lawful issue of their respective bodies and in default of said issue, then the same shall descend to and vest in my said three grandsons, sons of my son Augustus, the survivors or survivor of them.” * * *

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Appellant contends that because none of the three sons of August survived their aunt Martha E. Marsh, the life tenant, that testator must be held to have died intestate as to this fund.

The two children of Edward E. Marsh and the two children of Charles A. Marsh, appellees, contend that this clause created a vested remainder in fee simple in their respective fathers and their childless uncle William Marsh, and that they together inherit from their fathers and uncle, respectively, the entire fee simple of the real estate which is now represented by this fund to be distributed.

In the construction of a will the sole purpose of the court should be to ascertain and carry out the intention of the testator. Such intention must be ascertained from the words contained in the will. Where the intention remains in doubt, resort for aid must be had to settled rules of construction, but they can not control if they are in conflict with the apparent intention of the testator. *Townsend v. Townsend*, 25 O. S., 477; *Linton v. Laycock*, 33 O. S., 128; *Barr v. Denney*, 79 O. S., 358.

The will is long and involved and an exhaustive effort is shown in the endeavor to meet every possible contingency, clearly showing the desire on the part of the testator to leave no part of his estate undisposed of by his will or to provide in any way for his son Charles E. Marsh or his children. It shows, however, an intention to divide the entire estate into three equal parts, and to give one-third of his real estate for life only to each of the two female lines, to-wit, his daughter Martha E. Marsh, and his granddaughter Ida Hamilton Roberts, sole representative of a deceased daughter, and the other one-third to the three sons of his son Augustus in fee simple subject to certain interests given Augustus therein.

It also evinces an intention to give the share of his daughter Martha, on her death without issue, to the same three grandsons, and it make the same provision as to his granddaughter, the appellant.

In addition to this apparent intention shown in the will we must consider the legal presumption against intestacy found in the policy of the law, unless no other construction is possible.

Collier v. Collier, 3 O. S., 74; *Davis v. Corwine*, 25 O. S., 668, 675; *Fulton Trust Co. v. Phillips*, 218 N. Y., 573.

Estates created by will under the policy of the law will be regarded as vested rather than contingent unless the contrary intention is apparent from the context of the will. The estate in remainder, created by the will at the death of the life-tenant without issue seems to have all the attributes of a vested remainder. *Linton v. Laycock*, 33 O. S., 128, 134; *Gilpin v. Williams*, 25 O. S., 283; *Bolton v. Bank*, 50 O. S., 291, *Beckley v. Leffingwell*, 57 Conn., 163; *Mercantile Bank v. Ballard*, 83 Ky. 481; *Patterson v. Hennessey*, 85 N. Y., 91, 104.

“Vested interests liable to divestment are preferred, in construction, to interests contingent.” I Schouler on Wills, 5th Ed., Section 562, p. 724.

The estate in remainder vested in the sons of Augustus was subject to being divested upon the happening of one of two conditions: one that Martha E. Marsh leave issue at her death; the other condition was the element of survivorship provided for among the three brothers at the death of the life tenant without issue. This element of survivorship is all that raises any question of doubt as to the meaning of the clause. If these words had been omitted there would be no question but that a vested remainder was given to the three grandsons, subject to divestment only upon the death of the life tenant with issue surviving her.

It will be observed that the clause relating to survivorship is in the alternative and operates only in case one or more, and not all, of the brothers survive the life tenant. If that case had arisen there is no question but that the one or two brothers who died before the life tenant, leaving the one or two surviving her, would be divested of all interest in the remainder in favor of the survivor or survivors. But none of the three survived the life tenant; the clause became inoperative and fails in any way to affect or change the title in fee simple in remainder that had already vested in these three brothers under the will, because while the words “heirs” or other words of inheritance are not used here or anywhere in the will with reference to this re-

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mainder in those three grandsons, they would take a fee in remainder under the statute. General Code 10580.

The case of *Jeffers v. Lampson*, 10 O. S., 101, is directly in point, and particularly that part of the opinion found at page 104 quoting from the old case of *Harrison v. Foreman*, 5 Ves. Jr., 207. The cases of *Sturgess v. Pearson*, 4 Maddocks, 411, and *Belk v. Slack*, 1 Keen, 238, are also directly in point, as is *Mill v. Vernard*, 152 Mass., 767; also *Acres v. Dabney*, 133 Ala., 437.

The case of *Richardson v. Cincinnati Stockyards Co.*, 8 N. P., 213, relied upon by appellant, is not contrary to this doctrine. In that case certain land was devised by testator to his daughter Jane Richardson, and "the heirs of her body forever,"

"but in case of the death of said Jane Richardson without surviving issue of her body, then the property hereby to her bequeathed at the death of my said wife shall revert back to and be equally divided amongst my surviving children, share and share alike."

Jane Richardson survived all her brothers and sister and never had any children. It was held that—

"the reversion in the estate passed to the heirs of testator subject to be divested of it by Jane Richardson dying with issue of her body or with children of the testator surviving her, an event which it is now known can never happen,"

and the title of the property was therefore cast upon the heirs of testator. This holding followed the law as laid down in *Gilpin v. Williams*, 25 O. S., 283, and is not inconsistent with the holding in this case.

Among the cases relied upon by appellant are *Sinton v. Boyd*, 19 O. S., 30; *Smith v. Block*, 29, O. S., 488; *Richey v. Johnson*, 30 O. S., 288; and *Hamilton v. Rodgers*, 39 O. S., 242. None of these cases however disclose a situation similar to the instant case, or lay down a rule that controls it.

In *Sinton v. Boyd*, where testator give a life estate to his wife, after her death to be divided equally amongst his children or the survivors of them, it was held that the daughter of a son who

failed to survive his mother took no share where other children survived her.

In *Smith v. Block*, where real estate was conveyed to a mother for life and after her death to her surviving children by E, her husband and after the death of all said children to E, in fee simple, it was held that only such children as survived the mother took an estate, and that E took a vested remainder in fee subject to the intervening contingent estate of the children.

In *Richey v. Johnson* there was a direction to the executors to sell and divide after the death of testator's wife, equally between such of his brothers and sisters as might then be living, and the issue of those dead, *per stirpes*. There were survivors within the class thus divided who took the property.

In *Hamilton v. Rodgers* testator devised his estate to trustees to pay certain annuities out of the income, and to distribute after the "final cessation" of such annuities. It was held that the estate did not vest until the time fixed for distribution, which had not yet arrived.

Disregarding the alternative clause as to survivorship, which we have seen has become inoperative, the rule laid down in *Linton v. Laycock*. 33 O. S., 128, would apply and the language under construction would be held to have vested a remainder in fee simple in the three sons of Augustus W. Marsh, to-wit, Charles A., William H., and Edward E. Marsh.

William H. Marsh having died intestate leaving no widow or children, his one-third interest would pass by decent to his brother Charles A. Marsh and Edna Marsh and Eva Marsh Ford the children of his brother Edward E. Marsh.

Edward E. Marsh and Charles A. Marsh having also each died intestate leaving two children, these children would inherit the interests of their respective fathers, and therefore each of the four children, to-wit: Edna Marsh, Eva Marsh Ford, Charles E. Marsh and Blanche Marsh Salway would be entitled to one-fourth interest in said fund.

A decree may be taken accordingly.

HAMILTON, J., concurs.

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Pickaway County.

**CONSTRUCTION OF WILL WITH REFERENCE TO
AFTER ACQUIRED PROPERTY.**

Court of Appeals for Pickaway County.

[Judges of the Second Appellate District sitting in the place of Judges
Sayre, Walters and Middleton.]

JEROME BLACKER V. GEORGE W. LITTEN ET AL.

Decided, December 6, 1918.

*Wills—Testatrix Inherits Property After Executing Her Will—Inten-
tion Manifested to Dispose of all the Property of Which She Died
Possessed—Devise in Full of all Interest Does Not Bar Participa-
tion in a Lapsed Estate.*

1. A devise in a will to a daughter "to be her full share and interest in all my estate" does not bar such devisee from her share of property not disposed of by the will.
2. This construction is not affected by the fact that the property in controversy had been disposed of by a legacy which had lapsed by reason of the death of the legatee in the lifetime of the testator.

C. A. Leist and Barton Walters, for plaintiff.

G. W. Morrison and I. F. Snyder, contra.

ALLREAD, J.

This case involves a construction of the will of Margaret Blacker in respect to after-acquired real estate.

It appears that the will was executed on November 5, 1890. At the time of the execution the testatrix owned a farm of which she died seized. At the date of the execution of the will her husband Jefferson T. Blacker owned one-twentieth thereof, having been acquired by descent, and the nineteen-twentieths thereof by purchase.

Subsequent to the making of the will Jefferson T. Blacker died intestate and his estate descended to Margaret Blacker, who took a life estate in the one-twentieth and a fee simple in the nineteen-twentieths. Subsequently Margaret Blacker died seized of the fee simple estate in the nineteen-twentieths of said

real estate in addition to the farm owned by her at the date of the will.

It is contended by the plaintiff, a brother of Jefferson T. Blacker, that the nineteen-twentieths of the real estate acquired by purchase and owned by Jefferson T. Blacker at the time of his death, did not pass under the will of Margaret Blacker but descended upon her death as intestate property.

It is conceded that under the common law after-acquired real estate did not pass under a will and the following statute govern in this state.

“Any estate, right or interest in lands or personal estate or orther property acquired by the testator after making his will, shall pass thereby, as if held or possessed at the time it was made, if such manifestly appears by the will to have been his intention.” General Code, Section 10579.

The defendants claim under the seventh and eighth clauses of Item 3. These clauses are as follows:

“I give and bequeath to my brother George W. Litten should he survive my said husband Jefferson T. Blacker all my real estate during the term of his natural life.

“I give and bequeath to the children of my brother George W. Litten after the death of my said beloved husband and after the death of my said brother George W. Litten all the real estate of which I died seized and to them and their heirs and assigns forever to be divided equally among them share and share alike.”

Under the general scheme of the will, after providing for the payment of just debts and funeral expenses, the testatrix devised to her husband Jefferson T. Blacker “all the real estate of which I may die seized during the term of his natural life.” In Item 3 the testatrix bequeathed to his children if any should be born and survive “all the residue of my property both real and personal, after the payment of my just debts and after the death of my said husband” in fee simple. The testatrix then provides that if he should have no surviving child or children “then I devise my said property as follows.”

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There are several clauses under this item providing for specific devises. The fifth clause gives to the husband "All the rest and residue of my personal property of which I may die seized after the payment of debts and funeral expenses," and excepting specific devises. The sixth clause provides for a monument and the ninth clause provides for a remainder in the event of the death of George W. Litten's children without issue. The arguments *pro* and *con* rest largely upon the intention "manifestly" appearing in the concluding clause of Section 10579, General Code. It is contended by plaintiff that the intention to include after-acquired real estate and particularly the real estate acquired by her from her husband does not manifestly appear from the will of Margaret Blacker.

Coming to clauses seven and eight under which defendants claim, the life estate of George W. Litten is created expressly "in all my real estate." The remainder to the children of George W. Litten is expressly given "in all the real estate of which I die seized." If we confine our construction of the will to the express language used we would have no difficulty in holding that an estate was created by clause eight in favor of the children of George W. Litten in "all the real estate of the testatrix of which she died seized." This would include *ex vi termini* the after-acquired estate of the testatrix. The life estate of George W. Litten which is created under Item 7 in "all my real estate" is less conclusive than Item 8 creating the remainder.

In passing it may be said that even these words "all my real estate" is sufficient under the adjudications of our Supreme Court and the weight of authority in the lower courts to carry after-acquired real estate. The case of *Pruden v. Pruden*, 14 O. S., 251, is a leading case and has never been criticized nor questioned by any subsequent decision of the Supreme Court. In that case the devise to the wife for life was of all my moneys, credits, right and choses in action, personal and real estate and property. Under this general language in connection with the general scheme of the will it was held that after-acquired property passed.

Judge Ranney in one of his characteristic opinions after referring to the common law and the enabling statute says:

“Indeed, every line of this will looks to his death, and the situation of his property at that time, as the starting point in his dispositions. It is then that his debts are to be paid and it is then that his wife is to take, either for life or otherwise, all the residue of his ‘personal and real estate and property’ of every description; or, if she is not then living that it is all to go to his heirs, as though the ‘will had not been made.’ ”

These are the features of the Pruden will upon which Judge Ranney bases the conclusion that after-acquired property passes. All the features of the Pruden will are found in the Blacker will under consideration with the important addition that many devises expressly include “all the real estate of which I may die seized.” Devises containing less conclusive description are so entwined with the others as to make it clear that the same estate was intended throughout, and that the various terms of description were used interchangeably. In connection with the general scheme of distribution and the descriptive terms employed it was the clear intention of the testatrix to dispose of her entire estate at the time of her death. The case of *Wright v. Masters*, 81 O. S., 304, is not in conflict with the Pruden case. There the significant controlling fact was, as stated in the opinion, “the property therein devised by Item 1 to Mary Masters during her life is definitely designated and specifically described, and there is in the provisions of said will no hint or suggestion anywhere of a purpose on the part of the testator to give her more than the property thus specifically described.”

The rule established in the Pruden case, that after-acquired property passes under general description of the testator's property has been followed and applied to various wills in the following cases: *Lee v. Scott*, 5 C.C.(N.S.), 369; *Newton v. McKinstry*, 16 C.C.(N.S.), 219; *Strock v. Strock*, 26 C.C. (N. S.), 561.

See opinion of Judge Schauck, *Farrar v. Fallestine*, 4 C. C., 235.

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It is contended, however, that it does not manifestly appear from Margaret Blacker's will that she intended that the particular estate received by inheritance subsequent to the making of the will was intended to be included in her will. It is contended that the testatrix contemplated that her husband would survive her and take the life estate provided for in Item 2 and that the estates created in favor of George W. Litten and his children are dependent upon the idea of the survivorship of the husband. In this connection counsel cite the case of *Lepley v. Smith*, 13 C. C., 189, and rely upon the somewhat analogous provisions of that will and the argument of the majority of the court in the opinion.

The Lepley case involved a devise of "all my property both real and personal, moneys and affects." It is difficult to harmonize that decision with the Pruden case, the case of *Johnson v. Johnson*, 51 O. S., 446, and the circuit court cases in which general descriptions of that character were involved. Nevertheless we think that the decision in the Lepley case should not be extended to a case like the present where the intention to include subsequently acquired property is much more clearly and definitely expressed.

It is true that the testatrix in the case at bar may have considered it probable that her husband would survive her and with that contingency in view made provision for him and made other provisions in favor of her brother dependent upon the latter's survivorship.

It appears that the will of Margaret Blacker was made twenty-five years prior to her death. No evidence is offered to show that the testatrix was moribund or *in extremis*. It is a matter of common, if not universal, knowledge that there is no certainty of life and while the testatrix may have considered the probabilities of survivorship in favor of the husband, she must have been fully aware of the possibility that her husband might be the first called. She is presumed to have known the laws of nature and to have contemplated such possibility as the husband's prior death and a subsequent acquisition of his property by descent or deed. The testatrix evi-

dently intended by the words employed in the will to dispose of the estate owned by her at her death. The fact that she might subsequently acquire property even if not expected at the time the will was executed does not create an exception from the express terms of the devise. No one can know in advance what property may be subsequently acquired. Where a will clearly shows an intention to dispose of after-acquired property, it is not important that the testator did not foresee or judge the source and nature of the property. *Farrar v. Fallenstine, supra.*

It is urged that Item 3 should be limited to property which could have been taken by the husband, and that the term "said property" in Item 3 refers to property which the husband could have taken, and limits the character of the property carried in the subsequent clauses.

The force of this argument is met by the frequent repetition in the subsequent clauses in words of description, making it clear that she intended to dispose of all her estate of which she might die seized.

We have reached the conclusion that it is manifest from the terms of the will in controversy that the testatrix intended to dispose of all the real and personal property which she owned at the time of her death, and that George W. Litten took a life estate and his children the remainder in fee in the real estate in controversy.

Demurrer to the second cause of action sustained.

KUNKEL, J., and FERNEDING, J., concur.

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Lucas County.

JUDGMENTS BY DEFAULT.

Court of Appeals for Lucas County.

THE W. C. PRESSING CANNING CO. v. WELLER.

Decided, June 29, 1918.

Final Order—Judgment by Default is Not One to Which Error May be Prosecuted—But is Interlocutory Only, When—Section 12258.

A judgment by default in an action for damages, finding that the plaintiff is entitled to recover damages and ordering that the cause be sent to a jury to ascertain and assess the damages, is not a final order or judgment to which error can be prosecuted.

*Rhoades & Rhoades and G. Ray Craig, for plaintiff in error.
Taber & Daniells, contra.*

RICHARDS, J.

The defendant in error brought an action in the court of common pleas to recover damages and for an attachment. The court of common pleas sustained the attachment, to which judgment error was prosecuted to this court, and the judgment sustaining the attachment was reversed and the attachment discharged. While that proceeding in error was pending in this court, plaintiff in the court of common pleas secured the entering of a judgment by default in the following terms:

“This matter coming on to be heard upon the petition, the court finds that an attachment was issued, and levied herein upon the property of the defendant in Lucas county, Ohio, and that said property was appraised and valued at \$1,582.95, and that said property is now held by the sheriff of Lucas county, Ohio, under and by virtue of said attachment.

“The court further finds that the defendant is in default for answer or demurrer, and that the allegations of the petition are confessed by defendant to be true, and that plaintiff is entitled to recover damages from defendant.

“It is therefore ordered that this cause be sent to a jury to ascertain and assess said damages, and that the sheriff of Lucas

county, Ohio, proceed as upon execution to advertise and sell the personal property hereto attached to pay said damages.”

It will be observed that no damages were assessed, but that the cause was directed to be sent to a jury to ascertain and assess the damages, and in fact no damages have as yet been assessed. Shortly after the entering of the above, quoted order the W. C. Pressing Canning Company filed a petition in error in this court to reverse the alleged judgment on the grounds that the plaintiff in error had never been served with summons or process and had never entered its appearance and the court of common pleas never acquired jurisdiction over it. The only question however is whether the entry made in the court of common pleas is a final order or judgment which will authorize the prosecution of a proceeding in error.

General Code, Section 12258, defines a final order as follows:

“An order affecting a substantial right in an action, when in effect it determines the action and prevents a judgment, * * * is a final order which may be vacated, modified, or reversed as provided in this title.”

We are of the opinion that where a default is taken in an action to recover damages and the cause is directed to be sent to a jury for the assessment of damages, that this is not a final order determining the action within the meaning of the section above quoted, and that error will not lie to procure a reversal of such order until after the damages shall have been assessed by a jury, and a judgment rendered therefor. So far as we are aware our Supreme Court has not directly passed on this question in any reported case, but the views of the court have been expressed in the course of the opinion in several cases. In the case of *Towner v. Wells*, 8 Ohio, 136, 141, the court uses this language:

“Further proceedings were necessary to be had before the rights of the parties could be ascertained, or before execution could be issued. It may properly be assimilated to a judgment, by default or on demurrer, where a subsequent inquiry of damages is necessary. Such judgments are merely interlocutory, and can not operate as liens upon the lands and tenements of a defendant.”

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See also *Teaff v. Hewitt*, 1 O. S., 511, where the court held that an interlocutory decree is one which leaves some material question open for future determination.

See also *Kelly v. Stanberry et al*, 13 Ohio, 408, 421, to the same effect.

In the case of *Kerosene Lamp Heater Company v. Monitor Oil Stove Company*, 41 O. S., 287, 292, the court say in the course of the opinion:

“When a cause is retained for reference to a master, for the purpose of ascertaining a material fact, the decree is interlocutory only, and does not become final until the whole merits of the cause have been disposed of and nothing remains for the further action of the court.”

We call attention to the unreported case of *Arbuckle v. American Belting Company*, 91 O. S., 413, in which the Supreme Court vacated the judgment of the court of appeals on the ground that it had not acquired jurisdiction of the case, there never having been any final order or judgment in the court of common pleas; and the Supreme Court remanded the case to the court of common pleas with instructions to proceed according to law to assess the amount of damages. While the brief memoranda of that case does not disclose the nature of the action, we have been favored by counsel in that case with a copy of the printed record from which it appears that the action in the court of common pleas was one to recover damages and that a default entry was made and entered finding the allegations of the petition to be true and that upon the pleadings the plaintiff was “entitled to damages, the amount thereof to be assessed by a jury upon the further hearing of this case” and the court considered that the plaintiff should recover damages to be assessed by a jury to be thereafter impaneled. The printed record in that case also discloses that the court of appeals held that the entry did not amount to a final order or judgment, but was an interlocutory order only.

Of course, it would follow that if there were no final order then the court of appeals should have dismissed the petition in error for want of jurisdiction, but that court proceeded to adjudicate

certain other matters between the parties not necessary to be here stated and for this reason the Supreme Court, finding that no final order or judgment had been rendered in the court of common pleas, vacated the order of the court of appeals and ordered that the damages should be assessed by a jury. This holding we deem to be conclusive on the case now at bar. The decision of the Supreme Court was in accordance with the doctrine as stated in the text books, notably, 1 *Black on Judgments*, Section 28, where the rule is stated in the following language:

“The rule in regard to a judgment by default is, that if such a judgment is rendered for a fixed and liquidated sum, or if the amount can be ascertained by mere calculation from the pleadings, it is final; but if the amount of the recovery or damages remains to be ascertained by a writ of inquiry or other judicial method of computation, then the judgment is merely interlocutory, until such amount is settled and entered on the record.” See also 3 *Corpus Juris*, 607.

The Supreme Judicial Court of Massachusetts in *Riley v. Farnsworth*, 116 Mass., 223, held that a judgment for the plaintiff in an action for damages for breach of contract without assessing damages was not a final order and that an appeal would not lie therefrom.

It follows from what has been said that the original action in the court of common pleas being for damages, and the damages not having been yet assessed, a mere entry of default ordering that the case be sent to a jury to assess damages is not a final order or judgment and that the proceeding in error in this court to reverse the same must be dismissed.

CHITTENDEN, J., and KINKADE, J., concur.

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Hamilton County.

COMPENSATION RECOVERED FOR LEGAL SERVICES.

Court of Appeals for Hamilton County.

ALBERT T. BROWN V. MARTIN G. BRUNER.

Decided, February 3. 1919.

Champerty and Maintenance—Reduction of Street Assessment Secured—Property Owner Refuses to Share with Attorney the Amount—Quantum Meruit Recovery May be Had, When.

1. Where the contract of employment between attorney and client is void for champerty, but not otherwise illegal, the attorney is entitled to reasonable compensation for his services.
2. Suit for money was brought by an attorney on a contract with a client, and was dismissed on motion of the defendant, on the pleadings for champerty in said contract. *Held*: Such dismissal was not a decision on the merits and is not a bar to a second suit brought in *quantum meruit* for the services performed under the contract.

C. A. Groom and E. S. Aston, for plaintiff in error.

E. F. Alexander, *amicus curiae*.

SHOHL, J.

Martin G. Bruner employed Albert T. Brown, an attorney of Cincinnati, to secure a reduction by suit or otherwise of the assessment levied by the city of Cincinnati against his property on Cass avenue. Under the terms of that agreement Brown was to be paid one-half of the amount saved on the assessment, and was to bear all expenses involved in the litigation. An action was brought and a reduction of the assessment was secured. After a payment of ten dollars on account Bruner refused to make further payments, and Brown brought suit against him on the contract in the municipal court of Cincinnati. The defendant there secured a judgment on the pleadings from which no error proceedings were taken. Between the parties, therefore, it is settled that the contract was illegal. Brown then brought another suit in the municipal court for services rendered asking judg-

ment for the reasonable value of his services, alleging that they were worth \$88.97, which was the exact amount to which he was entitled had the contract been valid. Credit was given for the ten dollar payment. The defendant answered alleging that the services were performed under a contract adjudged to have been illegal. The municipal court decided in favor of the defendant, and the court of common pleas affirmed that decision.

The dismissal of the original suit does not bar the new action. It was not a decision on the merits and amounted to no more than a judgment on demurrer to the petition. *Moore v. Dunn*, 41 O. S., 62; *Rafferty v. Toledo Traction Co.*, 1 C.C.(N.S.), 538.

If the contract was champertous there is no doubt that the courts will not enforce it. *Davy v. Insurance Company*, 78 O. S., 256. It does not follow, however, that the plaintiff is entirely without remedy. The law of champerty and maintenance had its origin in England, where influential persons to whom rights of action were transferred in order to obtain their support and favor, harassed society and stirred up strife and litigation. "The power of the nobles became mighty in corrupting the fountains of justice and subverting the freedom and independence of the judicial tribunals. It was to remedy these evils that the law of champerty and maintenance was introduced," *Hovey v. Hobson*, 51 Maine, 62, 64. Under modern conditions the reason for the old rule has largely disappeared. The general tendency is toward a relaxation of the ancient doctrines relating to this subject. 11 Corpus Juris, 236.

In many jurisdictions where the services rendered by an attorney are not illegal, either on account of the nature of the service or the circumstances under which it is rendered, the attorney may recover in *quantum meruit*, notwithstanding the invalidity of the contract under which the services were rendered. *City of Rochester v. Campbell*, 184 Ind., 421, 425.

Cases have been cited supporting the opposite view. Such decisions as *Roller v. Murray*, 112 Va., 780 and *Barngrover v. Pettigrew*, 128 Iowa, 532, arise in states where such a contract for services was criminal. The case of *Moreland v. Devenney*, 72 Kans. 471, is in point but we regard it as opposed to the better

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view. The authorities are collected in 11 Corpus Juris, 269, and in the notes in 2 L. R. A. (N.S.), 263, and 39 L. R. A. (N.S.), 1202.

There is nothing in good morals that requires Bruner to have the work done for nothing. He knew just what the services were to be and he got results that were valuable to him. We adopt the rule established by the weight of the authoritative decisions, that although an agreement between an attorney and a client is void for champerty, if it is not otherwise illegal the attorney is nevertheless entitled to reasonable compensation for services rendered. The judgment will be reversed.

JONES, P. J., concurs; HAMILTON, J., dissents.

HAMILTON, J. (dissenting.)

I dissent from the judgment in this case for the following reasons:

Plaintiff first brought suit in the municipal court of Cincinnati on a written contract. The petition set up the contract and the plaintiff relied thereon for recovery. The contract provided for services as attorney to secure a reduction of street assessments, and among other things provided for the payment to the attorney for his services, "one-half of the amount saved on said assessment, said attorney to bear all expenses involved in the said litigation."

The reduction on the assessment was procured, and the attorney brought suit to recover under this provision of the contract.

The defendant in this case moved to dismiss the cause, and upon consideration the municipal court sustained the motion and dismissed the cause at cost of plaintiff. No further proceedings were taken in that case by plaintiff, and that judgment stands unmodified, unreversed and is a binding judgment on the plaintiff.

Thereupon the plaintiff filed his second suit, which is the case under consideration, in *quantum meruit* for the same services admittedly rendered under the contract sued upon in the first

case. I am unable to see how this can be upheld. The subject-matter of the suit was the written contract upon which plaintiff relied for recovery. He elected to pursue that course and should be bound by that judgment.

In the case of the *C. L. & N. Ry. Co. v. Pierson*, 18 C. C., 392, the syllabus is:

“A suit can not be maintained upon an express agreement which the plaintiff predicates upon an adjudication in a previous case, where recovery was sought upon the same cause of action, but covering a different period of time, the former case bein in *quantum meruit* based upon an implied contract.”

This case is simply the reverse of the instant case. In the case under consideration suit was brought on the express contract and judgment rendered, and he should not now be permitted to pursue his action in another suit in *quantum meruit*.

In the case of *Buchwalter v. Clendenning*, 17 C. C. (N.S.), 455, the court holds:

“A plaintiff against whom judgment has been rendered is estopped from prosecuting a second action against the same defendant for the same subject-matter by merely changing the form of the suit.”

In the case at bar litigation was carried on wholly by the parties to this action. The parties in this action who are interested are the same, and the subject of the controversy is the same. The only difference is in the form of the action. Plaintiff having elected to bring this action in the manner he did in the first suit, and it having been decided against him, should be estopped from prosecuting another action of the same subject-matter in another form. Under this view of the case any discussion as to the champertous feature of the contract becomes merely academic.

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Licking County.

EFFECT OF FAILURE TO PROVE A MATERIAL ALLEGATION.

Court of Appeals for Licking County.

**WILLIAM GILMORE V. OLLIE ALBERRY, AS ADMINISTRATRIX OF THE
ESTATE OF LESTER P. ALBERRY, DECEASED.**

Decided, November 7, 1918.

*Directed Verdict—Required for the Defendant—Where no Proof Has
Been Offered by Plaintiff Supporting a Material Allegation—Man
Killed by a Stallion—Alleged Negligence of the Owner—Charge of
Court.*

1. An instruction to the jury is not rendered erroneous by reason of the fact that standing alone and not further explained it might be construed as in effect saying to the jury that the proximate cause of the accident was as there stated, where the charge as a whole clearly explained the instruction and made it applicable to the pleadings and proven facts.
2. Where the plaintiff offers no proof as to a material and necessary allegation of fact which must be established before recovery can be had, there is nothing for the jury to pass upon, and on proper motion it is the duty of the trial judge to direct a verdict for the defendant.

*Fitzgibbon, Montgomery & Black, for plaintiff in error.
Flory & Flory and J. W. Horner, contra.*

HOUCK, J.

This cause comes into this court on petition in error to reverse the judgment of the common pleas court. The parties here stand in reverse order from which they stood in the lower court, and hereafter will be referred to as they appeared there.

Plaintiff brought suit to recover damages for the death of her husband, alleged to have been caused by a vicious stallion owned by the defendant.

The action was tried below to a jury, a verdict in favor of the plaintiff was returned, and a motion for a new trial was overruled and exceptions taken.

Numerous errors are set out in the petition in error, but counsel urged only two, namely:

1. That the trial judge erred in his general charge to the jury.

2. That the verdict and judgment are not sustained by the evidence and the law, and that the court erred in not sustaining defendant's motion for a directed verdict.

Let us discuss briefly the first error relied upon by counsel for a reversal of the judgment entered below, where it is claimed the court erred in instructing the jury as follows:

"The negligence and carelessness recited in this petition, which it is claimed caused the death of Alberry, is the service of the mare in an open space, called the barn floor, in front of and in sight of other stallions, which were hitched in the stalls. It is claimed that that act, the serving of the mare, in front of these stallions, and near to them, caused them to become excited; caused them to become vicious; caused them to bite and kick, and made the position or place of Alberry dangerous."

The court, in using the above language, was simply calling the attention of the jury to one of the claims of negligence charged in the petition, which, if standing alone, and if not further explained, might be construed, in effect, as instructing the jury that the proximate cause of the death of plaintiff's decedent was as thus stated, and not otherwise. If such were the case it would be misleading and prejudicial to the legal rights of the defendant; but an examination of the entire charge clearly explains the above statement and makes it applicable to the issues raised by the pleadings and the proven facts. The error thus complained of is not well taken.

But how stands the claim as to the second ground of error, to-wit: Is the judgment supported by the evidence and law?

In order to properly answer this question necessitated a reading of all of the testimony and evidence, as contained in the bill of exceptions, which we have done.

The defendant's answer, while making certain admissions, contained a general denial of all the other allegations, thereby casting the burden upon the plaintiff to maintain them by

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proper proof. Among the material allegations in the amended petition, which is denied in the answer of the defendant, is the following averment:

“That Lester Pearl Alberry, while in said stable in the course of his said employment, was kicked and struck by one of said stallions in said stable and so injured as to cause his death. That same was the result of the negligence and careless acts and omissions of the defendant,” etc:

It will be conceded that the allegation “that one of said stallions kicked and struck Lester Pearl Alberry” is a material statement, and that fact must be established by the evidence in the case, or plaintiff can not recover.

In a very careful reading of all the evidence in the case, as contained in the two hundred pages of typewritten matter, we have failed to find any evidence proving, or even tending to prove the fact, as averred in the petition, that one of the stallions, owned by the defendant, kicked and struck the decedent, thereby causing his death.

We think the rule is well settled that where any evidence in support of a fact has been offered, and passed upon by a jury, or where the evidence is conflicting, or where different minds might arrive at different conclusions from it, and a jury has determined the fact, that a reviewing court will not interfere with such verdict. But in the case now before us, as to a material and necessary allegation of fact which must be established before a recovery can be had, there is an entire want of proof; there is nothing for a jury to pass upon, and in such cases, upon the filing of a proper motion, it is the duty of the trial judge to direct a verdict.

It is clear to us that we are fully justified in arriving at this conclusion by the decision in the case of *Ellis & Morton v. Ohio Life Insurance & Trust Co.*, 4 Ohio State, 644, in which Judge Ranney says:

“But where no evidence is given to establish a fact, without which the law does not permit a recovery, he has nothing to submit to the jury; and the determination of the court, that the fact

constitutes an essential element in the right of action, necessarily ends the case."

This same doctrine is announced in the case of *Gibbs v. Village of Girard*, 88 Ohio State, page 34, fourth syllabus:

"A cause of action for damages brought against a village for negligence in the care of its sidewalks, by reason of which it is claimed plaintiff was injured, presents a jury case if there is some evidence tending to prove every essential fact necessary to entitle plaintiff to recover."

It will be observed in the case at bar, that as to one of the essential and material facts necessary to entitle the plaintiff to a judgment there was no evidence offered tending to prove the allegation. It therefore follows that, applying the rule of law laid down by our Supreme Court in the cases cited above, there is prejudicial error in the record now under consideration.

The record discloses that at the close of the plaintiff's evidence the defendant moved for a verdict thereon in his favor, which was overruled by the court, and excepted to by defendant. After all of the evidence was in, the defendant renewed his motion, which the court again overruled, and the defendant excepted.

We are of the opinion that the court of common pleas erred to the prejudice of the defendant below in not sustaining said motion, and that the judgment in this case must be reversed.

Judgment reversed.

POWELL, J. and SHIELDS, J., concur.

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Lucas County.

LIABILITY OF TRUSTEE FOR DEBTS CREATED BY HIM.

Court of Appeals for Lucas County.

ERNEST H. WITKER v. HENRY H. ELLISON ET AL.

Decided, May 27, 1918.

Trusts and Trustees—Estate Not Liable for Indebtedness Incurred by Trustee, Unless—Personal Liability Arises Against Trustee—In the Absence of Stipulation to the Contrary.

One who acts as trustee of a merchant tailor for the purpose of receiving daily the proceeds from the business transacted and paying the accounts arising, in order to provide for the continuance of the business, is personally liable for the purchase price of goods bought on his behalf and used in carrying on the business, in the absence of a stipulation relieving him from such liability.

Fell & Schaal and E. E. Davis, for plaintiff in error.
Hall, Flowers & Cotter, contra.

RICHARDS, J.

Henry H. Ellison and others, partners doing business as John B. Ellison & Sons, began an action in the court of common pleas in which they filed a third amended petition against Ernest H. Witker, claiming judgment in the amount of \$669.49. A demurrer to the third amended petition was overruled and an answer and reply filed. The trial resulted in a verdict and judgment in favor of the plaintiff for the amount claimed.

The bill of exceptions shows that one August E. Ziegler, had been engaged in business as a tailor in the city of Toledo, and that in 1913 his business had become so unsuccessful that he applied to his relatives for assistance. The indebtedness which he was then owing was about \$2,000 and various relatives, including Witker, executed notes for him to provide for the payment of his indebtedness. Thereafter the business was continued with the arrangement that Ernest H. Witker should act as trustee

for Ziegler and should receive the funds derived from the business and deposit the same in the bank in the name of Witker as trustee and should pay claims from this fund. Witker continued the business for a considerable period of time after this arrangement was made and accounts were opened, using the same books that Ziegler had theretofore used, but leaving a blank space after the time when Ziegler had constituted Witker trustee. The monies were deposited in the bank as provided in the name of Witker as trustee, and from this account various payments were made. Among other payments that were made was the indebtedness represented by the notes amounting to some \$2,000 which had theretofore been given for the prior indebtedness upon which Witker was liable.

While the business was being so continued, and while Witker was acting as trustee for Ziegler, goods were purchased of John B. Ellison & Sons and charged to Witker as trustee, the various items amounting to \$1,341.73. Upon this account Witker as trustee made two payments, one of \$500 and one of \$172.24, leaving the balance claimed in plaintiffs' third amended petition.

Ultimately Ziegler was taken seriously ill, and the business was closed up by Witker and the assets of Ziegler proved to be insufficient to pay the indebtedness of various creditors.

While several grounds of error are assigned in this case, on which it is claimed that the judgment in favor of Ellison & Sons should be reversed, the real and only question of law at issue is whether Witker is personally liable for the claim of Ellison & Sons. After a careful examination of the authorities we have no doubt of this liability. The general principle is laid down in 39 Cyc., 333, in the following language:

"Acting within the limits of his powers, a trustee may create contractual obligations enforceable against the trust estate, such as for goods, supplies, and services, where the trust contemplates the carrying on of the settlor's business by the trustee, or where the trust is for the support and maintenance of the beneficiaries. To render the estate liable, however, it must be shown that the trustee acted within the scope of his powers, and that the articles furnished were really for the use and benefit of the trust estate;

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and that the trustee may and should, in making contracts, expressly stipulate that the trust estate, and not he shall be liable thereon, for, in the absence of such an express agreement absolving him from liability, a contract made by him is binding on, and enforceable against, him alone."

We suppose it to be well settled that the contracts of guardians, administrators and other trustees, though made in the execution of the trust, impose upon them a personal liability in the absence of a stipulation relieving them therefrom. It was manifestly contemplated by Ziegler and Witker that the business should be continued and that in the continuance of that business it would, of course, be necessary to buy additional goods. Ellison & Sons were justified in charging these goods to Witker as trustee, and on the claim so made Witker would be personally liable.

In addition to the authority already cited we call attention to *Truesdale v. Philadelphia Trust, Safe Deposit & Insurance Company*, 63 Minn., 49; *McGovern v. Bennett*, 146 Mich., 558; *Knipp v. Bagby*, 126 Md., 461; *Taylor v. Davis, Admx.*, 110 U. S., 330

In view of the authorities we reach the conclusion that Witker became liable for the goods sold by Ellison & Sons.

Independent of the fact of the sale to Witker as trustee, the record discloses that Witker as trustee, used the funds in the bank in his name as trustee, which were derived from the sale of goods made subsequent to the time that he became trustee, in payment of the pre-existing indebtedness evidenced by promissory notes on which he was personally liable, and this fact is of vital importance in determining the liability of Witker.

The judgment of the court of common pleas will be affirmed.

KINKADE, J., concurs; CHITTENDEN, J., not participating.

PROVISION FOR TRANSPORTATION OF SCHOOL CHILDREN.

Court of Appeals for Licking County.

STATE OF OHIO, EX REL HENRY C. KELLER, v. BOARD OF EDUCATION
OF THE LICKING COUNTY SCHOOL DISTRICT.

Decided, October 10, 1918.

Schools—Pupils Must Attend School in Their Own District—Or Transportation Can Not be Required.

The statutory requirement that boards of education of rural and village school districts shall transport to and from the school house pupils of the district who live more than two miles from the nearest school in the district in which they reside, does not require that such transportation be furnished to children living in the district who are attending a nearer school in another district, and mandamus does not lie to compel provision of such transportation.

Jones & Jones, for plaintiff in error.

Charles L. Flory, Prosecuting Attorney, and *Kibler & Kibler*,
contra.

HOUCK, J.

This is a proceeding in error, and is here from the common pleas court of Licking county. The suit is one in mandamus, in which the plaintiff in error here was the relator below. In the lower court trial was had, and the petition of the relator was dismissed. The pleadings, admissions and proof disclose the following facts: That the board of education of the Licking county school district has capacity to sue and be sued under the laws of Ohio; that Henry C. Keller is a citizen of Licking county, Ohio, residing in Eden township, and is the father of three children, of the ages of eight, ten and thirteen years, and that they live with him; that his residence is more than two and one-half miles from the nearest school house in said Eden township school district; that said children are all below the high school grade; that there is a school in the Mary Ann township school

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district nearer to the residence of the said Henry C. Keller than the nearest school in the Eden township school district, where he resides, namely, what is known as the Rocky Fork school, and that said children are now attending that school, which is more than two miles from the residence of said Keller; that the relator, on the 20th day of December, 1915, made a demand on the board of education of the Eden township school district to transport his children to and from said Rocky Fork school, which it refused, and has neglected and failed to do; that on the—— day of August, 1917, the relator, in writing, made a demand on the board of education of the Licking county school district to provide transportation for said children to and from said Rocky Fork school, which it refused, and has failed and neglected to do.

Under these facts and the law, was the relator entitled to a writ of mandamus against the board of education of the Licking county school district, compelling it to transport the children of said Keller to and from said Rocky Fork school? If this inquiry is answered in the affirmative, then the judgment below must be reversed, otherwise affirmed.

Counsel for the plaintiff in error urge, in their written brief and in oral argument, that under Sections 7735, General Code, and 7731, General Code (107 Ohio Laws, p. 625), that the relator is entitled to the relief sought in his petition.

The first section reads:

“When pupils live more than one and one-half miles from the school to which they are assigned in the district in which they reside, they may attend a nearer school in the same district, or if there be none nearer therein, then the nearest school in another school district, in all grades below the high school, in which cases the board of education of the district in which they reside must pay the tuition of such pupils, without an agreement to that effect”. * * *

A careful reading of the language thus used fully convinces us that the provisions of this section of our school law have no application to the conceded facts in the case now under review. The purpose and intention of our Legislature in enacting the above statute is clear and manifest from the language employed,

namely: "*When pupils live more than one and one-half miles from the school to which they are assigned in the district in which they reside,*" etc.

In such cases the board of education must pay the tuition. In the present case the children reside more than one and one-half miles from a school in the Eden township school district, the one in which they reside. Therefore, if Rocky Fork school is the nearest to them, they are at liberty to attend that school, and their tuition must be paid by the Eden township school district to the Mary Ann township school district.

This section of the statute makes no reference to the subject of transportation of pupils, and has, as we view it, no application to the facts in the instant case.

The rule is well known that courts have no function of legislation. They can not supply or take from the language used in an act of the Legislature, and thereby change the plain meaning of the language contained therein, and by so doing read something into the law which was not intended. The Legislature must be understood to mean and intend what it has plainly expressed in the language used, and the intent to be ascertained and enforced is the intent expressed in the words of the statute.

The relator further relied upon the provisions of Section 7731, General Code, which reads:

"In all rural and village school districts where pupils live more than two miles from the nearest school the board of education shall provide transportation for such pupils to and from such school. The transportation for pupils living less than two miles from the school house by the nearest practicable route for travel accessible to such pupils shall be optional with the board of education. When transportation of pupils is provided the conveyance must pass within one-half mile of the residence of such pupils or the private entrance thereto. When local boards of education neglect or refuse to provide transportation for pupils, the county board of education shall provide such transportation and the cost thereof shall be charged against the local school district."

The provisions of the above section of our school code require boards of education of rural and village school districts to trans-

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port pupils residing in such districts, who live more than two miles from the nearest school, to the nearest school in the district in which they reside. It does not require such boards of education to transport pupils outside of the district in which they live. Therefore, we hold that the provisions of the section of the school code just referred to are not applicable to and have no bearing upon the facts in the case at bar.

Where a relator seeks a peremptory writ of mandamus, his right to same must be founded on a clear legal claim, and the natural justice of it must be apparent, and the facts alleged by the relator must be clearly proved, or the writ must be refused. Applying this rule to the case under review, we find the relator has not made out a case, under the facts and law, which would entitle him to the relief sought in his petition, and that a peremptory writ in mandamus was properly refused by the common pleas court.

Judgment affirmed.

POWELL, J., and SHIELDS, J., concur.

RIGHT TO COMMENT ON FAILURE TO PRODUCE EVIDENCE.

Court of Appeals for Hamilton County.

THE CINCINNATI TRACTION COMPANY, A CORPORATION, ETC., v.
SELMA MUENCHOW, AS ADMINISTRATRIX, ETC.

Decided, February 4, 1919.

Evidence—Counsel may Comment on Failure of Opponent to Call Certain Witnesses—Argument may be Illogical Without Being Prejudicial.

Argument to the jury to the effect that counsel for the defendant had failed to produce certain witnesses, at his command but unknown to the speaker, whose testimony had they been called might have had an influence favorable to the plaintiff, is not ground for reversal.

H. Kenneth Rogers, for plaintiff in error.
Littleford & Ballard, contra.

PER CURIAM.

The defendant in error recovered a judgment in the court below against the plaintiff in error for causing the death of Gotthelf Muenchow. The sole error complained of is that counsel for plaintiff below was permitted to argue to the jury that they had the right to conclude from the fact that defendant's conductor had taken the names of twelve witnesses and had only produced four that the evidence of at least one of the others would have been adverse to the company in one of the issues in the case.

Counsel had a right to comment upon the failure to produce evidence within the apparent control of the adverse party, and if his argument was illogical it was not the duty of the court to correct him. Thompson on Trials, Sections 983 and 989. The trial court was correct in refusing to rule as requested by defendant's counsel.

Judgment is affirmed.

JONES, P. J., HAMILTON, J., and SHOHL, J., concur.

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SETTING ASIDE ORDER OF COURT AFTER TERM.

Court of Appeals for Cuyahoga County.

SEVILLE H. MORSE v. FRANK HOMAN, A MINOR, BY FRANK
HOMAN, SR., HIS FATHER AND NEXT FRIEND.

Decided, June 17, 1918.

*Judgment in Favor of a Minor—Released by Entry of Satisfaction—
Vacation of Entry after Term Held to be Without Effect.*

The vacation of an entry of satisfaction is without effect where made after term and without following the course prescribed by the statute, whether regarded as a reversal or modification of the judgment or order of court to which it is directed, or as a reformation of a written instrument of release.

Hoyt, Dustin & Kelley, For Plaintiff in Error.
H. L. Deibel, Contra.

GRANT, J.

Error to the municipal court of Cleveland.

The transcript of entries in this case, so far as these are deemed material to the present consideration, shows that the action was begun in the court below by the defendant in error, on the 15th of June, 1915. Being a minor, his suit was begun, and has since been prosecuted, by his father as his next friend, agreeably to the statute permitting an infant's action to be so brought and litigated.

The claim was for personal injuries sustained by the minor, and a trial of the issue resulted in a judgment in his favor in the sum of one thousand dollars. The sum was paid to the father as next friend, whereupon the latter in due form receipted the docket and entered a full satisfaction and discharge of the judgment, executing such release in the name of the plaintiff infant.

On May 21, 1917, about two years after the rendition of the judgment and the entry of its payment, satisfaction and discharge, the plaintiff below filed his motion in the municipal court,

asking that the entry of satisfaction referred to be vacated, for two reasons. The first was that the entry of discharge, being made by the next friend of the minor plaintiff, was invalid in law, as being without authority existing in the receipt. The second assigned reason was to the effect that the plaintiff had in fact received no part of the judgment money, while the entry of satisfaction stood in the way of his enforcing it a second time by execution against the original defendant, Mrs. Morse.

This motion was not made by the plaintiff in the action, although it ran in his name. It was made by one Emslie—who was no party to the suit and who had not asked to be made a party,—purporting to be acting as guardian of Frank Homan, the infant plaintiff, but who had not intervened in the action in any way and was not issuably or properly before the court.

Notice of the filing and pendency of the motion was given to the defendant below.

The municipal court entertained this motion, and on the 19th day of November, 1917—two years and five months after the rendition of the judgment—the entry to which this proceeding in error is addressed was made, as follows:

“Said entry of satisfaction is hereby vacated and set aside to the extent of \$800 and interest from June 15, 1915 and plaintiff is hereby permitted and allowed to issue execution on said judgment to the extent only, however, of \$800, and interest from June 15, 1915, and no more, the remaining \$200 of said judgment of \$1000 having by stipulation of the parties herein been rightfully paid to and retained by Messrs Schwan and Schwan, the original attorneys of record for the plaintiff herein; and upon precept filed by the plaintiff herein, or his attorneys, execution is ordered to be issued on said judgment to the extent of \$800.”

An exception was saved to this deliverance of the court, and also to the denial of a motion for a new trial of whatever was heard in the proceeding thus narrated. What was done in this respect by the municipal court is assigned as error in this proceeding by the plaintiff here, and a reversal of it is for that reason asked.

It is an undisputed rule of the common law that courts of record have plenary control of their own judgments, entries and

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processes, during the term at which they were made. This principle is fully recognized in Ohio: *Niles v. Parks*, 49 O. S. 370.

It is equally true that at common law this control passes from the court with the term at which the judgment was rendered, the entry made, or the process issued.

It is said in *Black on Judgments*, Section 306:

"It was the rule of the common law, that after the expiration of the term the court loses control of its judgments rendered during that term; they become final, and the court has no longer the power to vacate or modify them, or to set them aside."

In *Brown v. Schulten*, 104 U. S., 410, the court says:

"It is a general rule of the common law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that court. But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist, they can only be corrected by such proceeding as a writ of error or appeal as may be allowed by the court which by law can review the decision."

Most states, including Ohio, have by statute given a remedy against the hardship which must sometimes result from this loss of power to vacate or modify judgments after the term at which they are entered, and this relief must be sought within such limits as the enabling statute may prescribe. In this state the power is conferred and the procedure regulated by Chapter 6, Title 4, Division 4 of the present General Code, beginning with Section 11631. That section authorizes a court to "vacate or modify its own judgment or order, after the term at which it was made," on ten enumerated and specific grounds. The further proceedings may be by motion where the infirmity alleged is a mere irregularity or clerical error not going to the substance of the former rendition. Where the claimed vice in the judgment resides in the merits of the case, the adjudication of vacation

or correction must be upon pleadings issuably presenting the question raised.

None of the ten grounds assigned by the statute existed, or was claimed to exist in this case in invoking an interference with the entry of satisfaction undertaken to be vacated by the action of the municipal court in the proceeding now under review.

The syllabus in *Assurance Co. v. Raper*, 78 O. S., 113, is authority for holding that "the power of the court of common pleas to vacate its judgment after term upon motion is controlled by Section 5354 R. S."—present Section 11631, General Code; and the case holds that the burden is on the mover to show that the irregularity occurred before or at the taking of the judgment.

A judgment, as defined by statute in Ohio, "is the final determination of the rights of the parties. A direction of a court or judge, made or entered in writing and not included in a judgment, is an order."

If then, what the court below undertook to do in the matter we are now reviewing was to vacate its own judgment or order, it was without power to do it and its action in that behalf was inert and a nullity. And this is so because the judgment or order—if such it was—which the court undertook to disturb, had long before passed from its inherent control and the only method allowed by law for regaining that control was not pursued or pretended to be pursued.

If what the court attempted to vacate was not a judgment or order, but was a part of its process or entries in the case,—in short, if it was any judicial act or evidence of it,—then it still must fall under the condemnation of the common law rule laid down in *Black* and already referred to, to the effect that the control ends with the term of rendition.

There is a provision of statute,—General Code, Section 11705,—which specifically authorizes a court to vacate an entry of satisfaction of a judgment rendered in the same court. But its operation is limited to the one contingency of a plaintiff in execution ordering in good faith a levy on property not subject to it, and which has thereupon been sold and applied on the judgment and a recovery has been had by the proper owner from the execu-

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tion plaintiff and the latter has paid to to the former. In such case the court may, upon motion and notice to the judgment defendant, have the satisfaction so made out of the sale of the property set aside, and he shall thereupon be entitled to collect the judgment. But the right conferred by that section does not extend to the case of the execution plaintiff losing or otherwise disposing of the money once collected by him and in consideration of which he entered satisfaction of the judgment—such loss of the money being one of the findings of fact in the case at bar, in support of the judgment vacating the entry and permitting execution to issue for a part of the amount of the judgment.

There is a case in Ohio, *Wilson v. Stilwell*, 14 O. S., 464, in which was done exactly what was done in this case; that is, on motion an entry of satisfaction of a judgment was vacated and execution was awarded.

Whether this was done at or after term does not specifically appear in the report of the case. The judgment was rendered at the December term, and the motion to vacate was made in the March following. From the nearness of these dates to each other the probability is that the motion was within the term. And this seems to be made certain from the fact that the court deduces its power to act from the following recitation of the law—"Every court has control over its process, and of entries upon its record,"—a control which it does not have after the term at which the thing asked to be vacated became effectual in law as the act of the court, under the common law rule already referred to.

That the remedy was sought by motion and summarily, is an infirmity noticed by the court but which is obviated by the consideration that, as no objection on that ground was made, the point was deemed to have been waived. Moreover, a clear case of fraud was made out in the case, and upon equitable grounds the judgment of vacation proceeded. We can find no such grounds in the present case.

Indeed the judgment under review here was made upon no other purported footing than that the money was paid to the next friend who instituted the suit and recovered the judgment, but who, as the court below holds, was not entitled to receive the proceeds of it or to give acquittance for it.

Of course if the thing vacated was any part of the judicial doings in the case, this conclusion has no force after the term at which it was done—the mode and limitations prescribed by statute in such cases not having been followed by the mover or observed by the court.

If the entry of satisfaction was obtained by fraud or was the result of a mutual mistake, an appropriate remedy could be invoked and advanced; but that is not this case.

It is difficult to see at this point of the proceeding why two hundred dollars worth of the satisfaction vacated should be allowed to stand, if the satisfaction as a whole was without warrant of law and a mere nullity, as having been made by one not entitled to make it. If the division into eight parts of unlawful payment and two parts of lawful is put upon the ground that the question was adjudicated in the Schwan case, no reason is perceived why the immunity allowed to the attorney should not extend to the client in the same action.

There is a recitation in the “conclusions of law” in the record to the effect that the abatement of the two hundred dollars was made “by stipulation of the parties herein,” which is not, however, among the conclusions of fact in the record; and the only “parties herein” to do the stipulating, are the plaintiff below, that is, the minor by his next friend, who is found by the court to have been incapable of taking the judgment money and by the same token unable to stipulate it away—and the defendant, who is objecting to this view of the inability of the father to act in receiving and giving acquittance for any of the proceeds of the judgment.

It is urged in the brief of the judgment debtor that the next friend was competent to take the money and give the release, not only to the extent of his attorney’s fees, but for the entire amount. And in the opinion of the Schwan case it was intimated that the law is to the contrary, although the point was not decided. A further examination of the subject leads us to think that the question is at least doubtful. In some of the cases it was not really raised; they are either cases where there was a regular guardian already appointed and both capable and ready to take

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the fund, or where the next friend compromised the judgment instead of receiving the avails of it in full; such was the fact in *Stilwell v. Wilson, supra*, the judgment plaintiff in that case being only in form entitled to bring the action.

But we do not find it necessary to decide this question.

We find and hold that if the purported vacation of the satisfaction was a reversal or modification of any judgment, order or other process or entry of the court in the cause, it was too late to be effectual, the course prescribed by statute not having been observed or followed; and that if the purported action of the court was a reformation of a written instrument or release, such effect could not be wrought upon motion only, made after term, not in manner and form provided by law for the purpose, and over the objection of the adverse party. Upon either alternative the court was without power to do what it undertook to do by the order under review.

The judgment is for that reason reversed and judgment for costs is here rendered for the plaintiff in error.

LAWRENCE, J., and DUNLAP, J., concur.

CONTRACTOR COMPLETING THE WORK ENTITLED TO LIEN.

Court of Appeals for Mahoning County.

MINNIE SILVER, ET AL V. J. V. THOMAS ET AL.

Decided, June 18, 1918.

Mechanic's Liens—Contract Awarded to Partners—One Abandons the Work, the Other Goes on and Completes It—Latter May File a Mechanic's Lien—Which Does not Depend upon the Contract, but on the Fact that Labor and Material were Furnished—Judgment may be Entered for Plaintiff after the Granting of Motion for a New trial, When.

1. When a contract to make an excavation to a building is let to a co-partnership, but before the work is completed one of the partners refuses to proceed and abandons the contract, but the other partner

- carries it on to completion, the latter is entitled to a mechanic's lien on the property in his own name.
2. The provisions of G. C. 8312 (103 O. L., 369), "until the statements provided for in this section are made and furnished in the manner and form as herein provided * * * the sub-contractor shall have no right, of action," etc., does not require the sub-contractor to furnish such statements directly to the owner unless required by such owner to do so. It is sufficient for him to furnish such statements to the original contractor, and it is his duty to furnish them to the owner.
 3. When the undisputed facts shown in the trial of an action entitle the plaintiff to judgment, it is not error for the trial judge, after granting a motion for a new trial, to render judgment for the plaintiff upon such facts.

L. L. George, for plaintiff.

E. M. Brown, contra.

METCALFE, J.

This action was begun by the defendant in error, Thomas, to foreclose a mechanic's lien against the property of the defendant below, Minnie Silver.

Mrs. Silver is the owner of a lot in the city of Youngstown and she entered into a contract with one Katzman to erect a building thereon. Katzman sub-let the excavation of the basement to the defendant, Ralph Maso, and Maso sub-let the contract to Thomas & Keegan, a co-partnership.

After the work had begun Keegan, Mr. Thomas' partner, refused to go on with the work and thereafter Thomas continued it alone to its completion, and afterwards took out a lien upon the premises in his own name and not in the name of the partnership.

It is insisted that the lien should have been taken in the name of the co-partnership, and not in the name of Thomas alone, and that by reason thereof the lien is invalid.

The right to a mechanic's lien does not depend upon contract, but depends upon the fact that the plaintiff who claims the lien furnished labor and materials that entered into the construction of the building. The contract gives him the right to do the work, but, after he has completed it, it is the law that

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gives him the right to the lien. We think it makes no difference that the contract was with the firm. After the work was commenced, but before it was completed, one of the partners dropped out of it and the other carried it forward to completion. We think he is clearly entitled to take out the lien in his own name.

But it is insisted that the law was not complied with by Mr. Thomas by reason of the fact that he did not give any notice to the owner of the work and labor performed and materials furnished by him.

We do not think the statutes require a sub-contractor to furnish any statement to the owner of the premises, unless he is required to do so by the owner himself. The language of the statute, Section 8312 General Code (103 O. L. 369), relied upon to sustain the contention of the plaintiff in error, Mrs. Silver, is as follows:

“Until the statements provided for in this section are made and furnished in the manner and form as herein provided, * * * the sub-contractor shall have no right of action or lien against the owner, part owner, etc., * * * until he shall have furnished such statement.”

We have to look further to the provisions of the statute to find out what the “statements provided” for in this section are. The statute provides for certain statements which the original contractor shall make on his own account before he can require any payment of money on the contract, and then

“The original contractor shall also deliver to such owner, part owner, lessee or mortgagee similar sworn statements from each sub-contractor, accompanied by like certificates from every person furnishing machinery, material or fuel to such sub-contractor.”

It seems to us clear, from the provisions of Section 8312, that the sub-contractor is required to furnish the statement named only to the original contractor, and that the duty does not rest upon him to make any statement whatever to the owner, unless such owner requires him to do so. This seems to us to be made clear by the following provision in the same section:

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"In order that the owner, part owner, lessee, mortgagee, or a contractor may be protected, he or his agent may at any time during the progress of the work demand in writing of the contractor, or any sub-contractor, any or all statements herein provided for, which shall be made by the contractor or sub-contractor and given to the owner * * * within ten days after such demand is made."

We think that when Mr. Thomas made the statements required by the statute and delivered them to the original contractor he fully complied with the law.

Another question is raised in this case which is of some interest. The question of the amount of the indebtedness in favor of Thomas against Mrs. Silver was submitted to a jury. After the verdict was rendered the trial judge granted a new trial and thereupon on his own motion rendered judgment in favor of the plaintiff for the amount of his claim.

It is urged that this was error, but, upon the undisputed facts as they appear from this record, there is no question of the right of the plaintiff to recover. We think, therefore, that the defendant below could not have been prejudiced by the action of the court.

Therefore, the case is affirmed.

POLLOCK, J., and FARR, J., concur.

INSUFFICIENT PUBLICATION OF NOTICE.

Court of Appeals for Cuyahoga County.

THE STATE OF OHIO, EX REL PAUL CIRACI, v. E. J. KEHRES.

Decided, December 23, 1918.

Village Contracts—Advertisement for Bids for Public Work—Construction of the Provision as to Time Found in the Statute—Discretion of a Mayor as to the Signing of a Contract.

Mandamus does not lie to compel the mayor of a village to sign a contract which has been entered into by council for a public improve-

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ment, where the advertisement calling for bids for the proposed work appeared on the 7th and 11th and were opened on the 15th of the month.

D. T. Miller and E. P. Wilmot, for plaintiff in error.
Locher, Green & Woods, contra.

GRANT, J.

Heard on error to the court of common pleas.

The action below was in mandamus. The respondent is mayor of the village of East View. The council of the village, in form of law, declared it to be necessary to improve Kinsman road, one of its streets, at an estimated expense of nearly thirteen thousand dollars, the fund to meet the expenditure being provided for as required by statute.

Notice that bids for the work would be received on April 15, 1918, at meridian, was published in a newspaper of circulation in East View; such publication being twice made, on April 4, and April 11, 1918, respectively, and at no other time. The bids were opened at the date named in the notice, namely, on April 15, 1918. Council of the village on July 15, following found that the relator was the lowest and best bidder for the work to be done, and thereupon awarded the contract to him and directed the mayor and clerk to execute it by signing it as provided by statute.

The mayor refused to do this, and the suit below was to compel him to do so or show cause why he should not.

For cause the mayor by answer, among other things, alleged that the relator was not the lowest and best bidder for the work; that another bid was seven hundred dollars lower than his bid, which lower bid was rejected by the council on the ostensible ground that the bidders—there were two of them—were subjects of Italy, although they had in due form of law declared their intentions to become citizens of the United States; that the action of the council in receiving bids on the day named and in assuming to award the contract as they did, amounted to an abuse of the discretion vested in them in the matter and so was wholly inoperative and of no effect.

To this defense the relator demurred. The demurrer was overruled, and the relator not choosing to plead further, judgment went against him dismissing his suit. Whereupon he prosecutes error to reverse that judgment.

The sole question here, therefore, is, was the demurrer properly overruled?

This question again is resolved into the further inquiry as to whether any discretion is lodged in the mayor as to signing the contract provided for him by the council, or as to withholding his signature.

For it seems certain that if he has discretion, while mandamus may compel him to exercise it one way or the other, he can not be compelled to exercise in one way or the other, he can not

The first proposition concerns the sufficiency of the notice as advertised in point of elapsed time.

The statute in that respect—Section 4221, of the General Code—is as follows:

“All contracts made by the council of a village shall be executed in the name of the village, signed on behalf of the village by the mayor and clerk. When any expenditure other than the compensation of persons employed therein exceed five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village and publicly read by him.”

Without particular regard to the historical evolution of this section, our opinion is that its language, in the respect we are now discussing, furnishes a sufficient test of its application to the exigency confronted by it. What constitutes a week is a matter of common knowledge; it means seven days in continuity of lapse. By the same token, two weeks are fourteen days, one following upon another, in sequence of succession. We find no particular significance in the words “consecutive weeks,” as found in the section. A literal translation of “consecutive,” is following next. The word throws no light on the question in hand to the effect of varying the definition already given.

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To our apprehension, the really operative words which can resolve any doubt in the matter are "*not less than*."

"Not less than" two weeks,—unless controlled otherwise by judicial construction—means not less than fourteen days, in a continuous following of one upon that which went next before it.

We feel that any ingenuity expended in coming to another conclusion, would be effort wasted, and work directed to no practicable end.

We have examined *Gilfillan v. Koke*, 2 O. D. Rep., 172, and *Harmon v. Whittemore*, 1 Bull., 107. In the former, the late Judge William Lawrence, with characteristic industry, examined the question and reached, substantially, the determination we have indicated as our own in this case. In the latter, the late Judge Hamilton, in this county, followed the former. Both seem to have been well considered.

If we are right about this, then the notice as published, was substantially insufficient and conferred no right on the council to open the bids and let the contract, at the time this was done. What the respondent was called upon to sign, therefore, was in no legal sense a contract.

It will be observed that the requirement of Section 4221 is that "*all contracts*" of the village shall be signed by the mayor. He is not called upon to execute a paper that is no contract. That amount of discretion in the nature of things must be, and unquestionably is, vested in him. His discretion in that respect can not be measured by that of the council, nor can he be controlled in its exercise by what the council may think is a suitable exercise of theirs.

Even if the mayor were to sign such a contract as we have found this one to be, his signature would give to it no vitality and impart no force; it would still be no contract, except as to the form. The enabling statute was still with an unperformed condition, the performance of which could alone create a validity in it.

Our conclusion is that the answer of the respondent stated a defence to the action, and that the demurrer to it was properly overruled.

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It follows that there is no error in the record and the judgment under review must be affirmed.

DUNLAP, J., and WASHBURN, J., concur.

DUTY OF GUARDIAN TO PAY TAXES ON WARD'S PROPERTY.

Court of Appeals for Trumbull County.

FRANK RAUB V. MARY APPLEBY ET AL.

Decided, October 11, 1918.

Guardian and Ward—Relation of Trust and Confidence—Prevents Divesting of Title of Ward—In Property Acquired by Guardian at Delinquent Tax Sale.

It is the duty of the guardian of a tenant in common, who is under mental disability to pay the taxes on the ward's property, and such guardian can not acquire title to the common property by allowing the taxes to become delinquent and then purchasing the same at a tax sale, and the same rule applies to a tenant in common who is in possession of the property.

G. P. Gillmer, for plaintiff.

J. H. Leffingwell, contra.

METCALFE, J.

This action was brought in partition by the plaintiff in error, Frank Raub, against the several defendants to partition certain lands in the city of Niles.

The mother of both the plaintiff and defendants died seized with the property in question. By the terms of her will the land was to be divided equally among the children.

The will provided, also, that so long as any of the children remained unmarried such unmarried child or children should have the right to occupy the property, and the duty of paying the taxes and assessments of all kinds was imposed upon the one so occupying the property.

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All the plaintiffs and defendants had either died or married excepting Hannah and Lizzie Raub. Hannah is under mental disability, and Mary Appleby is her guardian. Hannah and Lizzie had the right to occupy the premises, and the duty rested upon them jointly to keep up the taxes and assessments.

The taxes, however, were allowed to become delinquent, and the premises were sold at delinquent tax sale and bought in by Mrs. Appleby while acting as such guardian for Hannah. The tax deed is conceded to be in conformity to the law, and under ordinary circumstances would convey a good title.

The question here is whether or not Mrs. Appleby, being a tenant in common with the other parties in this case and guardian of one of the defendants upon whom rested the duty to pay such taxes could, by allowing the taxes to become delinquent, acquire title to the premises at a delinquent tax sale.

We are firmly of the opinion that under the circumstances such a transaction is not authorized by law, and that a deed obtained under these circumstances does not, as against the other tenants in common vest any title in Mary Appleby whatever, beyond a lien upon the land to the amount of the taxes which she paid.

In the case of *Clark v. Lindsay*, 47 O. S. 437, the widow of a decedent was entitled to dower in lands of her deceased husband, and the duty of paying the taxes rested upon her. She allowed the taxes to become delinquent and the property was sold and purchased by one of the devisees, or heirs, who was tenant in common with the other parties in the case. Judge Dickman, writing the opinion of the court, uses this language:

“The auditor’s deed under the statute vests in the grantee, his heirs and assigns ‘a good and valid title, both in law and in equity.’ but the question arises, whether by virtue of the tax sale and the auditor’s deed, J. W. Clark was divested of all interest in the land upon his failure to redeem his separate interest from his co-tenant within two years. In our view the relations existing between tenants in common, whether in possession of the property or entitled to an estate in remainder, is of a nature to preclude such a result. Just dealing and the confidence necessarily reposed in each other would suggest that owners in com-

mon of real estate should consult for the mutual benefit. While one should not act intentionally to the detriment of the other, good faith should withhold him from all actions in reference to the common property that would work exclusively to his own advantage."

The opinion then quotes approvingly the following language from *Tisdale v. Tisdale*, 2d Sned 599:

"Tenants in common by descent are placed in confidential relations to each other by operation of law as to the joint property, and the same duties are imposed as if a joint trust were created by contract between them, or the act of a third party. Being associated in interest as tenants in common by descent an implied obligation exists to sustain the common interest. This reciprocal obligation will be vindicated and enforced in a court of equity as a trust. These relations of trust and confidence bind all to put forth their best exertion and to embrace every opportunity to protect and secure the common interest and forbid the assumption of a hostile attitude by either."

Our attention is called to the case of *Jinkiaway v. Ford*, decided by the Supreme Court of Kansas, L. R. A. 1915-E, 343, and it is urged that that case sustains the plaintiff's position. We do not think so. In that case the title to the property was acquired by a remainderman who was not in possession and was under no obligation to pay the taxes, but that is quite a different proposition from the one we have before us. Mrs. Appleby was a tenant in common; was under personal obligations to pay her share of the taxes; and under legal obligation to pay the taxes for her ward.

To allow her under such circumstances to acquire title to the common property would be to allow her by her own wrong to obtain an advantage over her co-tenants which the law will not permit.

Judgment of the lower court affirmed.

POLLOCK, J. and FARR, J., concur.

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**NEW YORK STOCK EXCHANGE MEMBERSHIP TAXABLE
IN OHIO.**

Court of Appeals for Hamilton County.

JOHN M. ANDERSON V. PETER W. DURR, AS AUDITOR, ET AL.*

Decided, February 3, 1919.

Taxation—Seat in a Stock Exchange is Personal Property—And Subject to Taxation in Ohio.

1. A membership in the New York Stock Exchange is property in the nature of a chose in action.
2. Such property is taxable at the domicile and residence of the owner and the laws of Ohio subject it to taxation.
3. The Constitution of Ohio imposes on the General Assembly the duty to pass laws taxing all property with certain named exceptions. This requires the enactment of laws to carry it into effect.
4. In construing a statute passed pursuant to such provisions the court imputes to the General Assembly the intention to comply with the constitutional requirement.

Murray Seasingood, for plaintiff.

John V. Campbell, Prosecuting Attorney, and *Walter M. Locke*, Assistant Prosecuting Attorney, contra.

SHOHL, J.

This is an action in which plaintiff seeks to enjoin the auditor of Hamilton county from listing on the tax duplicate as taxable property plaintiff's membership in the New York Stock Exchange, and to restrain the treasurer from collecting taxes thereon.

The case was heard on appeal, and there was a stipulation as to the facts in addition to the admissions in the pleadings.

The plaintiff is, and has been for a number of years, a member of the New York Stock Exchange, an unincorporated association of eleven hundred members. It owns the entire capital

* For opinion below see 20 N.P.(N.S.), 538.

stock of the New York Stock Exchange Company, a corporation which holds title to real estate in New York City, and certain other stocks and securities. It furnishes exchange rooms and other facilities, in New York City, for the convenient transaction of brokerage business by members. The right conferred by the membership is to trade in accordance with the regulations which now authorize trading at the exchange in New York City, and not elsewhere, in certain securities listed on said exchange according to certain conditions, and at certain hours. Persons are admitted to membership only upon the vote of two-thirds of the fifteen members comprising the committee on admissions. They pay annual dues, and there is a life insurance feature for the benefit of their families. A transfer of membership may be made upon the submission of the name of the candidate to the committee on admissions and the approval of the transfer by two-thirds of the committee. There are no stock certificates but persons elected are notified by letter signed by the secretary. The exchange has regular meetings at which officers and committees are elected, and they manage the business of the association. The plaintiff paid over \$60,000 for his seat. It has a market value, and, subject to the acceptability of the transferee to the committee on admissions, is transferable by sale. The market value ranged from \$60,000 or thereabouts in 1911 as low as \$34,000 in 1914 to over \$70,000 at the present time. Under the rules of the Exchange members charge their customers not less than one-eighth of one per cent. as commission for purchases and sales of securities. When such purchaser is another member, however, he may purchase for a commission of one-fourth the regular amount, and in certain cases for one-fiftieth of one per cent. In the case of removal or suspension of a member, or at his death, his seat is sold and the net proceeds of such sale, after satisfying the claims of such creditors as are members, are paid over to the member or his personal representatives.

Plaintiff contends that the membership is a privilege incident to real estate in New York, that it is an incorporeal hereditament, and therefore not taxable in Ohio; second, that even if

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it is property in Ohio, it is not within the terms of the statute specifying the property which should be listed for taxation; and, third, that if the property were taxed in Ohio it would violate constitutional rights.

There is no question but what a seat on a stock exchange is property. It is conceded by counsel, and the authorities are clear. *Rogers v. Hennepin County*, 240 U. S., 184; *Page v. Edmunds*, 187 U. S., 596 (Philadelphia Stock Exchange); *Sparhawk v. Yerkes*, 142 U. S., 1 (New York Stock Exchange); *Hyde v. Woods*, 94 U. S., 523 (San Francisco Stock and Exchange Board); *In re Currie*, 185 Fed., 731; *O'Dell v. Boyden*, 150 Fed., 731; *Bank v. Abbott*, 181 Mass., 531; *State v. McPhail*, 124 Minn., 398; *Powell v. Waldron*, 89 N. Y., 328; *Platt v. Jones*, 96 N. Y., 24.

It is not taxed in New York under the general laws (*People v. Feitner*, 167 N. Y., 1), though it is taxable under the New York inheritance tax law. *Matter of Hellman*, 174 N. Y., 245.

In the *Rogers* case, 240 U. S., at page 189, the court cites with approval the language of the Minnesota case as follows:

"A membership has a use value and a buying and selling or market value. It is bought and sold. * * * There is a lien upon it for balances due members * * * It passes by will or descent or by insolvency or bankruptcy. * * * It is true that there are certain restrictions in the ownership and use of a membership. These may increase or decrease its value, probably in the case of a board of trade membership greatly enhance it. They do not prevent its being property."

The exact nature of the property arising from membership in a stock exchange has not been conclusively adjudicated by the Supreme Court. In support of the argument that it constituted real estate in New York, reference was made by plaintiff to the case of *Louisville Ferry Company v. Kentucky*, 188 U. S., 385, holding that the ferry franchise granted by the state of Indiana was an incorporeal hereditament, and therefore not taxable in Kentucky. On first impression there are points of similarity between a membership in a stock exchange and a

ferry franchise. The rights to exercise the incidents of membership as to buying and selling stocks and securities are with respect to a specific piece of real estate in New York City, at least the present rules of the Stock Exchange so indicate. A careful analysis of the Louisville Ferry Company case shows, however, that the decision rests primarily upon historical reasons. See pp. 394, 395. The reference in Kent's Commentaries and Washburn on Real Property show this, and the court points out that a widow has been allowed dower in a ferry.

The law of incorporeal hereditaments is a relic of medieval law. Pollock and Maitland's History of English Law, pp. 123-148, shows how the jurists of earlier days regarded certain rights with respect to land as "things." Tiffany on Real Property, pp. 9-13, shows the modern law and summarizes as follows:

"We find the only things of this nature recognized in this country are rights as to the use or profits of another's land, and franchises, or certain classes of franchises, and consequently these together with land and things annexed thereto (corporeal things real) are among the subjects of real property."

There is no authority and no justification for any extension of the law in respect to incorporeal hereditaments to adjudge a stock exchange membership to be realty. It does not descend to the heirs of the owner. The title to the land on which the business is done is held in fee simple in the realty corporation. The unclouded title could be conveyed away by it without the plaintiff's consent. It is urged that the ownership of all the stock in the realty company is a mere form, and that plaintiff's interest is substantially in real estate. This is no more true than a similar claim with respect to the right of a share holder in any realty company. Such stock is personalty no matter what the corporation owns. *Morawetz on Corporations*, Section 225; *Hawley v. Malden*, 232 U. S., 1, 12; *Lee v. Sturges*, 46 O. S., 153, 161.

The nature of a membership in an exchange was before the Supreme Court in the case of *Rogers v. Hennepin County*, 240

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U. S., 184. The question involved there arose in connection with the taxability of a membership in the Chamber of Commerce of Minneapolis. The tax authorities were claiming that memberships were taxable in Minnesota. If such memberships constituted incorporeal hereditaments and were therefore realty, it would have been very simple for the Supreme Court to have said so and to have decided the case upon that ground. At page 191 the court uses the analogies of a credit in favor of a non-resident and of shares of stock. We do not regard the right as being in the nature of an incorporeal hereditament, but that does not dispose of the question. There is no doubt that a state law which attempts to tax personal property, permanently situated in another state, is void. *Southern Pacific Company v. Kentucky*, 222 U. S. 63, 74; *Western Union Telegraph Company v. Kansas*, 216 U. S., 1; *Metropolitan Life Insurance Company v. New Orleans*, 205 U. S., 385; *Union Refrigerator Transit Company v. Kentucky*, 199 U. S., 194; *Delaware, etc., R. R. Co. v. Pennsylvania*, 198 U. S., 341; *State Tax on Foreign-Held Bonds*, 15 Wallace, 300.

Under the Rogers case, 240 U. S., 184, the memberships could be taxed in New York. That does not necessarily prevent it from being within the power of the state of Ohio to tax them, *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S., 54, 58; *Blackstone v. Miller*, 188 U. S., 189, 204, 205.

In *Hawley v. Malden*, 232 U. S., 1, in distinguishing the Louisville Ferry Company case from the case of a share of stock, the Supreme Court says at page 12:

“While the shareholder’s rights are those of a member of a corporation entitled to have the corporate enterprise conducted in accordance with its charter, they are still in the nature of contract rights or choses in action. Morawetz on Corporations. Section 225. As such, in the absence of legislation prescribing a different rule, they are appropriately related to the person of the owner, and, being held by him at his domicile, constitute property with respect to which he is under obligation to contribute to the support of the government whose protection he enjoys. *Kirtland v. Hotchkiss*, 100 U. S., 491; *Bonaparte v. Tax*

Court, 104 U. S., 592; *Covington v. First National Bank*, 198 U. S., 100, 111, 112; *Southern Pacific Company v. Kentucky*, *supra*; *Cooley on Taxation* (3d ed.), 26."

The rights of a member of a stock exchange likewise entitle him to have the enterprise conducted in accordance with its regulations and purposes, and, are likewise in the nature of contract rights or choses in action. The right to go to the Exchange Building on Wall street and there buy and sell is no doubt the most important incident of the membership, but the right to "split commissions" and the right of a member to procure the service of other brokers at a lower rate are also valuable rights. They follow him wherever he goes. The relationship between the members is governed by the constitution of the exchange, which every member is required to sign. By such signature he "pledges" himself to abide by the same and by all subsequent amendments thereto. The basis of his rights therefore is a contract, a chose in action.

The situs of an ordinary chose in action is well settled. It is regarded as property where the obligee is. In the case of *State Tax on Foreign Held Bonds*, 15 Wallace, 300, the court considers the suggestion that a debt is property where the debtor is. At page 320 the court says:

"To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due."

The normal situs, for purposes of taxation, of choses in action is at the domicile of the owner. *Southern Pacific Co. v. Kentucky*, 222 U. S., 63, 76; *Union Transit Co. v. Kentucky*, 199 U. S., 194, 205; *Bonaparte v. Tax Court*, 104 U. S., 592; *Kirtland v. Hotchkiss*, 100 U. S., 491; *Cooley on Taxation*, 89-93, 650, 651.

As this property is in the nature of a chose in action, it is taxable at the domicile of the owner. It has been established

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that, under certain exceptional conditions, choses in action may be given a situs for taxation elsewhere. *Hawley v. Malden*, 232 U. S., 1, 12; *Liverpool, etc., Insurance Co. v. Orleans Assessors*, 221 U. S., 346; *Metropolitan Life Insurance Co. v. New Orleans*, 205 U. S., 395; *Blackstone v. Miller*, 188 U. S., 189; *Kidd v. Alabama*, 188 U. S., 730; *New Orleans v. Stempel*, 175 U. S., 314; *State, ex rel Goetzman v. Lord*, 161 N. W., 516.

In the *Hawley* case the court states that the question does not arise there, and need not be decided, whether the provision by the state of incorporation, fixing the situs of shares for the purpose of taxation there, excluded the taxation of the shares by other states in which the owners resided. The case of *Fidelity, etc., Trust Company v. Louisville*, 245 U. S., 54, probably ends the doubts on this point. But in the case at bar no such provision is involved. The normal situs for taxation at the domicile has therefore not been disturbed. It follows that the state of Ohio has the power to impose a tax upon plaintiff's membership in the New York Stock Exchange.

Section 2 of Article XII of the Ohio Constitution imposes upon the General Assembly the duty to pass laws taxing all property at its true value in money, with certain exceptions. This requires the enactments of laws to carry it into effect. *Zanesville v. Richards*, 5 O. S., 589, 593; *Exchange Bank v. Hines*, 3 O. S., 1. Unless statutes were passed which did include the property in question, it is not taxed. *Whitely v. Arbogast*, 6 N.P.(N.S.), 313; 9 C.C.(N.S.), 584 (affd. 79 O. S. 429).

The question then is, have laws been passed taxing property of this character?

In the case of *Gould v. Gould*, 245 U. S., 151, the court states that in the interpretation of statutes imposing taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, nor to enlarge their provisions so as to embrace matters not specifically pointed out. In cases of doubt they are construed in favor of the citizens. The statutes there involved were passed pursuant to constitutional provisions that enabled the Legislature to enact statutes. A special rule applies where the Legislature is passing statutes

which it is specifically required to enact. The purpose of the framers of the Ohio statutes must be interpreted in view of that constitutional duty.

In the case of *Lee v. Sturges*, 46 O. S., 153, 159, the court says:

"It is clear that the purpose of section one is to tax all investments in stocks held within the state. This we are bound to assume, for every presumption is in favor of that construction of the law which gives effect to the requirement of the section of the Constitution referred to, and we are forced to the conclusion that the General Assembly, in enacting this law, intended, so far as the complex nature of human business affairs should make it practicable, to include within the taxing provisions all property within the state."

The precise distinction seems to have been in the contemplation of the court in the case of *Cincinnati v. Connor*, 55 O. S., 82, 91, wherein the court says:

"The rule generally prevails that, *independent of any legislative requirement on the subject*, statutes imposing taxes and public burdens of that nature are to be strictly construed; and where there is ambiguity which raises a doubt as to the legislative intent, the doubt must be resolved in favor of the subject or citizen on whom the burden is sought to be imposed."

Section 5328 of the General Code provides:

"All real and personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title."

We have already decided that a seat on the stock exchange constitutes personal property in this state. It is taxable, therefore, unless Section 5328 is limited by Section 5325. Section 5325 defines personal property, and, being *in pari materia*, the two sections must be construed together. *Cincinnati v. Connor*, 55 O. S., 62, 89. If therefore "personal property" as used in

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Section 5328 includes only the enumerated items set forth in Section 5325, it may be difficult to find it specified therein. A majority of the court are of the opinion that it might be included under the phrase "the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion or interest in such stocks, profits or means by whatsoever name designated." I can not agree with them as to that.

The entire court is in agreement as to the following. Section 5325 provides "the term 'personal property' as so used shall include," * * * Then follows an enumeration of certain forms of property. This does not exclude the property in question. If the statute had been passed pursuant to constitutional provisions which merely authorized or empowered the levying of a tax, we would be disposed to hold that other kinds of property were excluded by the rule of "*expressio unius est exclusio alterius*." However, the Legislature was required to pass laws subjecting all real and personal property to taxation. The effect to be given to this is well stated by the Supreme Court of Minnesota. That state had a constitutional provision substantially like that of Ohio. In the case of *State v. McPhail*, 124 Minn. 398, in discussing whether a seat of the Duluth Board of Trade was taxed, the court says:

"Section 797 names 11 specific classes of personal property, in no one of which are by name included board of trade memberships. So far as here material, its language is as follows: Personal Property * * * shall be construed to include:

"1. All goods, chattels, moneys and effects." Then follows ten other particular classes of property."

"Section 835 provides that the assessor shall fix the value of the items of personal property under thirty heads, the last of which is 'the value of all other articles of personal property not included in the preceding items.'

"We think it should not be held that Section 797 was intended to describe all personal property that was subject to taxation. The language of the section does not compel such a conclusion. 'Shall be construed to include' does not necessarily mean 'shall

only include.' The section was not intended to be restrictive, but rather to help define what was meant by 'all personal property,' as that term is used in Section 794. The view is greatly strengthened by the unquestioned fact that it is the settled policy of the state, as expressed in its Constitution, statutes, and decisions, that all property within the state shall be taxed, unless exempt. *Board of County Commissioners of Rice County v. Citizens National Bank of Faribault*, 23 Minn., 280, 286; *State v. Jones*, 24 Minn., 251; *County of Olmstead v. Barber*, 31 Minn. 256; 17 N. W., 473, 944; *In re Jefferson*, 35 Minn., 215, 219, 28 N. W., 256; *State v. Stearns*, 72 Minn., 200, 222, 75 N. W., 210. In the Rice County case, decided in 1877, in referring to Section 1, c. 1, p. 1, Laws 1874, which provides that "all real property in this state, and all personal property of persons residing therein, * * * is subject to taxation" the Court said: 'The evident purpose of this section was to declare, in general terms, that all property, both real and personal, within the jurisdiction of the state, unless specifically exempted, should be subject to taxation.' In *State v. Jones*, where it was decided that a certain debt was property and subject to taxation, Chief Justice Gilfillan said: 'This debt was property, and it was the intention both of the Constitution and statute that all property, unless expressly exempted, should be taxed.' At the time these and other decisions were rendered, there were in force statutory provisions similar to Section 797, Laws 1874, p. 1, c. 1. Section 3, provided that 'personal property shall, for the purpose of taxation, be construed to include' certain described classes of property, and the same provision was contained in chapter 1, Section 3, Laws 1878, in chapter 11, Sections 3 G. S. 1878, and in Section 1510, G. S. 1894. In no case has it been considered that these provisions amounted to a declaration that no property was to be taxed that was not covered by the classes. It would have been a breach on the part of the Legislature of a duty imposed by the Constitution to omit from taxation property that was not exempt, and we certainly should not find such a breach unless the statute is fairly open to no other construction."

Unless the statute is fairly open to no other construction, we should not impute to the Legislature an intention to omit from taxation property which the Constitution requires it to tax.

The application for an injunction must be refused, and the petition will be dismissed.

JONES, P. J., and HAMILTON, J., concur.

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OPINION ON APPLICATION FOR RE-HEARING.

(Decided, February 20, 1919.)

Murray Seasongood, for plaintiff.*Louis H. Capelle*, Prosecuting Attorney, and *S. C. Roettinger*, Assistant Prosecuting Attorney, contra.

SHOHL, P. J.

Although the constitutional question was considered by the court, no specific reference was made to it in our former opinion. The matter is discussed in the cases there cited, particularly in the case of *Rogers v. Hennepin County*, 240 U. S. 184, at pages 191, 192. It does not appear that the other forms of property are exempt in Ohio, and if they were the *Rogers* case disposes of the effect of such discrimination on the constitutionality of the law.

The application for re-hearing will be denied.

HAMILTON, J., concurs; CUSHING, J., not participating.

FORFEITURE BY DELINQUENCY OF RIGHT TO FRATERNAL BENEFITS.

Court of Appeals for Hamilton County.

GEORGE H. GEIS, ADMINISTRATOR, v. THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, ETC.

Decided, June 24, 1918.

Mutual Benefit Societies—Forfeiture for Delinquency—Statutory Authority for such a Provision—Acceptance of Overdue Premiums—Does not Work an Estoppel against Denial of Liability under the Policy, When.

1. The general rule that forfeitures are not favored and that by-laws providing therefor will be so construed as to avoid forfeiture if the language employed will admit of such construction, is without application in the case of a beneficial order operating on the assess-

ment plan, where the constitution and by-laws provide that, in case of delinquency in the paying of assessments and by virtue thereof, members in default forfeit at the time of its occurrence all right to indemnity or benefits of any character, and the laws of the state provide that the constitution and rules of the order shall constitute a part of the contract of agreement between the order and its members and officers of subordinate bodies are deprived of all power or authority to waive the said provisions.

2. Acceptance of payment of previous delinquent assessments does not estop the order from denying any right of recovery in case of a member whose death occurred during the period of such delinquency, no steps having been taken to restore him to good standing.

Horace A. Reeve, Howard N. Ragland, attorneys for plaintiff in error.

John A. Millener, supreme attorney; *John C. Hermann*, of counsel for defendant in error.

HAMILTON, J.

Catherine Geyer, widow of Henry Clay Geyer, brought suit in the common pleas court of Hamilton county to recover on a policy of life insurance issued by the defendant company on the life of her husband who died November 1, 1915. Catherine Geyer has since died, but the case was revived in the name of plaintiff in error, her administrator.

The case was submitted on an agreed statement of facts, and the court found in favor of the defendant company, from which judgment error is prosecuted to this court.

The defendant company is a fraternal beneficial order, operating on the benefit assessment plan and the payment of semi-annual membership dues.

It is agreed that Geyer had paid all semi-annual membership dues to Janutry 1, 1916, and all assessments levied for insurance up to and including assessment No. 128, which was paid by Geyer August 23, 1915; that on September 24, 1915, insurance assessment No. 129 was called by the defendant, which was due and payable on or before October 24, 1915; that this assessment of two dollars was not paid or tendered on or prior to October 25, 1915,, nor prior to his death, which occurred November 1, 1915,

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in an automobile accident, nor has said sum been paid or tendered since his death. It is further agreed that Geyer paid four insurance assessments after the dates upon which the same became due, but that neither the Supreme Council, nor any of its members had any knowledge of the fact that Geyer had paid any of his assessments to the secretary-treasurer of the subordinate council after the time had expired within which he should have paid the same; that the constitution and by-laws have been duly and regularly adopted and were in full force and effect.

Proofs of death were made, and payment of the policy demanded, which was refused on the ground that failure to pay assessment No. 129 worked a forfeiture of all rights and benefits under the policy.

The question for determination is, Did the failure to pay assessment No. 129, as above set forth, preclude a recovery under the policy?

It is urged by plaintiff in error that the law does not favor forfeitures, and that by-laws providing therefor will be construed to avoid forfeitures if the language employed therein, considered in connection with the other by-laws, will admit of such construction.

As a general statement of the law this is correct, but in applying this general rule to the instant case, will the language of the by-laws admit of such construction?

Section 9469 General Code provides:

“Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter, or articles of incorporation of, if a voluntary association, the articles of association, the constitution and laws of the society, and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of the same certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to such charter or articles of incorporation, or articles of association, if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate shall bind the members and his benefi-

aries, and shall govern and control the agreement in all respects the same as though such changes, additions, or amendments had been made prior to and were in force at the time of the application for membership."

Section 9481 General Code provides:

"The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members."

These sections clearly bind the members of the society, including Geyer, to the express wording of the constitution and by-laws.

Section 7 of the constitution and by-laws provides (p. 56):

"Any member who fails to pay fees, fines, costs dues, or any assessment charged or levied against him, when and as the same become due and payable, shall immediately upon the happening of such default and by virtue thereof, become a delinquent member; and he and every person or persons claiming under him and by virtue of his membership and his certificate of insurance shall likewise at the time such default occurs and by virtue thereof, forfeit all right to indemnity and benefits of whatever character; * * *"

This language is clear and unambiguous, and is a part of the certificate of insurance.

Upon default of payment of assessment No. 129 on or before October 25, 1915, under section 7 of the constitution and by-laws, Geyer *ipso factor* became *delinquent*, and all rights under his certificate were forfeited. Under the terms of the by-laws a member thus *delinquent* may restore himself to good standing by paying all sums due, before the next regular meeting of his subordinate council. On failure to make such payments the member shall be *suspended*. It will be noted that forfeiture of rights under the certificate of insurance does not depend upon suspension, but is dependent only upon delinquency. It is admitted that neither Geyer nor any one for him paid or tendered the sums assessed at any time after his becoming delinquent, and under the by-laws he was delinquent at the time of his death.

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Page 2 of the insurance certificate under the head of "Delinquency" stated:

"Should such delinquent member at any time regain his good standing as an insured member in the Order his restoration thereto shall be in no wise operate to entitle him or any one claiming by, through, or under him, or his membership, or his certificate of insurance to indemnity or benefits on account of any accident or injury received by him, while not in good standing, or on account of death resulting therefrom."

In applying Section 9469 General Code, in the case of *Pete v. Woodmen of the World*, 5 C. C. (N.S.) 453, the court says:

"The stipulations in the application and certificate, together with the provisions of the laws of the association quoted constitute the essential terms of the contract between the insured and the association necessary to be considered by us, and by which the beneficiary is bound. It is well settled by the authorities that all of these rules, these laws of the Order, constitute a part of the contract binding upon the insured. It is well settled by the authorities that under circumstances like these shown in the record here, the insured is conclusively presumed to have known what these laws were and what they required of him."

To this effect was also the holding in the case of *Chevaliers v. Shearer*, 6 C. C. (N.S.), 587.

We are therefore of the opinion that the trial court was correct in holding that all rights under the certificate of insurance were forfeited, and in finding in favor of the defendant.

Plaintiff in error makes the further point that the defendant, by reason of accepting the payment of some four prior assessments after the time limit, was estopped to insist upon forfeiture; that they do not claim a waiver, but they undertake to distinguish between waiver and the common law doctrine of estoppel.

Since waiver is not claimed by the plaintiff in error we are unable to see how the doctrine of estoppel could be applied to this case. If the defendant is estopped to claim a forfeiture of rights under the certificate of insurance, it must be on the ground that, by action or conduct, some of the provisions of the constitution and by-laws, or some of the terms of the certificate of insur-

ance, which provide for forfeiture, have been waived, since the provisions referred to are broad, comprehensive, clear, and unambiguous.

In the case of *Order of United Commercial Travelers v. Young*, 212 Fed. Rep., 132, the court clearly states the law on this question of waiver and estoppel. The first paragraph of the syllabus in that case is as follows:

“The secretary-treasurer of a local council of a fraternal insurance order has no authority to waive the constitution and by-laws of the order stipulating for payment to a beneficiary a specified sum on the death of a member in good standing, but that members shall be deemed in good standing so long only as they pay dues and assessments as they become due, and that any member failing to pay them at maturity, shall by virtue thereof, forfeit his good standing, and a practice between the local officer and a member thereof for the payment of dues and assessments after maturity is not binding on the Order unless authorized or ratified.”

For the reasons above stated, and upon the authorities cited, the judgment will be affirmed.

JONES, P. J. and WILSON, K., concur.

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**LIABILITY TO A REAL ESTATE BROKER FOR A COMMISSION
ON A SALE WHICH FAILED.**

Court of Appeals for Franklin County.

THOMAS C. JAMISON V. RICHARD A. HARRISON, JR.*

Decided, February 19, 1919.

*Broker's Commission—Owner Liable Therefor—Where Sale Fails
Through Inability to Give Title—Presumption Upon Which the
Broker May Rely.*

1. A real estate broker who undertook to procure for a property owner "a purchaser who would be ready, willing and able to buy" the property in question at a specified price, is entitled to his commission upon producing such a purchaser, notwithstanding the sale failed through inability of the party with whom he contracted to give title.
2. The broker in such a case has a right to rely on the presumption that the party contracting with him will be able to perform his part of the contract and furnish title to a prospective purchaser.

Wilson & Rector, attorneys for plaintiff in error.

James A. Allen, contra.

KUNKLE, J.

This is an action to recover a broker's commission. The case was submitted to the lower court upon a demurrer to the petition of plaintiff in error. The demurrer was sustained and final judgment rendered. From such judgment plaintiff in error prosecutes error to this court.

The petition alleges that on or about the first day of May, 1918, the plaintiff entered into a contract, not in writing, with the defendant, by the terms of which plaintiff agreed to procure for defendant a purchaser who would be ready, willing and able to pay at the rate of \$175 per acre for certain real estate in which the defendant had an undivided one-fourth interest and which real estate is described by metes and bounds.

*Reversing *Jamison v. Harrison*, 21 N.P.(N.S.), 266.

The petition further states that defendant agreed to pay plaintiff for his service in procuring such purchaser the sum of \$2,115.75, said sum being three per cent. of said sale price of the farm; that on or about June 15, 1918, the plaintiff procured a purchaser for said farm who was ready, willing and able to buy the same and to pay therefor at the rate of \$175 per acre; but the defendant upon being notified by plaintiff that such purchaser had been procured, failed, neglected and refused to contract with said purchaser for the sale of said farm or cause the same to be sold or conveyed to him for said consideration.

Plaintiff therefore asks judgment in the sum of \$2,115.75.

This case must be determined from the particular contract alleged to have been entered into by the said parties.

The plaintiff agreed: "To procure for defendant a purchaser who would be ready, willing and able to buy at the rate of \$175 per acre the real estate in question."

The petition alleges that the plaintiff "Did procure a purchaser for the said farm who was ready, willing and able to buy the same and to pay therefor at the rate of \$175 per acre."

It is in effect admitted that the averments of the petition are sufficient to charge the defendant with liability if the defendant had been the sole owner of the real estate in question.

It is contended, however, by defendant that plaintiff is not entitled to recover, because the plaintiff knew that the defendant was not the sole owner of the property, but owned only a one-fourth interest therein, and because it does not affirmatively appear from the petition that the defendant was authorized by his co-tenants to employ the plaintiff as a broker to find a purchaser for the entire property in question and to complete a sale in the event such purchaser was secured.

Counsel for defendant in error among other authorities cites Sections 183, 186 and 256 of Mechem on Agency and quotes therefrom as follows:

"Where several persons having common interests desire to be represented by an agent, it is, in general, true that one of such persons has no implied power to appoint an agent for all, and that all must unite in making the appointment. Each may

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appoint for himself or all unitedly may appoint for all, but one has no implied power to appoint for another or for all.

"In the case of co-tenants, there is no implied authority in each to act for all so as to bind them personally, and the act of one, or the appointment of an agent by one will, therefore, bind that one only.

"In the first place it is to be recalled that, except in the few cases already referred to wherein the law confers authority, the law itself makes no presumption of agency; it is always a fact to be proved; and the person who alleges it has the burden of proving it by a preponderance of the evidence."

We think the above citations would apply in a case where the contract was sought to be enforced against third persons, but would have no application in the present case where the plaintiff does not seek to hold anyone except the person with whom he made the contract.

We think it is well established that where a party employs a real estate broker to find a purchaser for certain real estate upon certain terms, and the broker secures such a purchaser and the sale is not completed because of the fault or inability of the party so contracting with the broker, then the broker would be entitled to recover. This doctrine is applied in cases such as where the party so contracting with the broker does not own the property or where there is a defect of title. 202 N. Y. Reports, p. 293; 202 N. Y. Reports, p. 423; Vol. 19, Cyc., pp 246-7-8, etc.; Vol. 4, Ruling case Law, Section 51; 41 N. Y., p. 477.

The broker has a right to rely upon the presumption that the party contracting with him has the ability to perform the contract and furnish a title to the prospective purchaser.

This rule is well stated in the case of *Arnold v. National Bank of Waupaca*, 126 Wis. Reports, page 368, namely:

"It is entirely clear, as already stated, that, if an individual employs an agent to find a customer for certain lands, he becomes liable for the agreed compensation, whether he owns them or not, although he may have acted on the mistaken supposition that he had title. He impliedly represents that he does own them." See also 16 Oklahoma Reports, p. 308.

In the case of *Martin v. Ede* in 103 Calif. Reports, at page 160, the following rule is announced in the syllabus viz:

"Under a written authority to a real estate broker to obtain a purchaser for land at a stated sum, within a specified period, for an agreed commission, in order to entitle the broker to recover the commissions agreed upon, it is only necessary to show that, in pursuance to the employment, and within the time specified therein, he found a purchaser ready and willing to purchase the property upon the terms specified in the authorization.

"A real estate broker has nothing to do with the title or ownership of the property, and his knowledge as to the title, or the equitable estate of a third person therein, is of no consequence; and his right to the compensation contracted for does not in any way depend on the validity or invalidity of the defendant's title to the property."

The judge, in announcing the opinion of the court, says:

"To entitle plaintiff to recover his commissions under the agreement, it was only necessary to show that in pursuance of his employment, and within the time specified therein, he found a purchaser ready and willing to purchase the property on the terms specified in the authorization. This he did beyond dispute.

"With the title or ownership of the property he had nothing to do, and his knowledge as to the title or the equitable estate of Josephine Cory therein was of no consequence. These were questions for the defendant to determine when he made the agreement.

"It is a matter of common knowledge that, in the business world, men do frequently obtain what are termed options upon real property—that is to say, the right to purchase, and then employ brokers to negotiate a sale at an enhanced price, the title being all the while in others.

"Brokers sell tons of wheat for future delivery on account of principals who do not or may not own a kernel of that commodity; yet in the absence of law prohibiting knowledge of the non-ownership of their principals does not defeat their right to recover.

"A may possess such knowledge as justifies him in this judgment in contracting to sell, or in contracting with a broker to sell for him or to find a purchaser for property which he does not own. If he does so, without so guarding his agreement as to save himself, in case of failure to secure title to the thing he has authorized to be sold, he can not be heard to complain of the result of his own folly or lack of foresight.

"If A is employed by B to labor at a monthly stipend upon land which they both know B does not own, and the services are

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performed in consonance with the contract, a recovery can not be defeated by such knowledge on the part of A."

If the correct rule in such cases does not favor the broker to the extent announced in the above case, nevertheless it does not appear from the petition in the case at bar that plaintiff had knowledge that the defendant would be unable to convey or secure the conveyance of the property in question to the prospective purchaser.

It does appear from the petition that the plaintiff knew that the defendant merely owned a one-fourth interest, but nevertheless we think the plaintiff had a right to assume that the defendant had or would secure authority from his co-tenants, which would enable him to carry out the provisions of the contract which he himself made with the plaintiff, and we also think the plaintiff had a right to act upon the assumption that the defendant had or would secure from his co-tenants authority to carry out the contract if a purchaser was secured upon the terms specified in the contract.

There are some cases which hold that where a broker has knowledge of defective title, and the sale is defeated because of such defect, the broker can not recover, but without expressing any opinion upon that question, we think the same would be a matter of defense. 16 Oklahoma Reports, 308.

We have carefully considered the authorities cited and have also examined a number of additional authorities relating to the subject of brokers' commission, but as there is such a difference in the terms of employment many of the cases so examined are of no special benefit in determining the rights of the parties in the case at bar.

We think the plaintiff has stated a cause of action in his petition and that the demurrer should have been overruled.

The judgment of the lower court will therefore be reversed and cause remanded.

ALLREAD and FERNEDING, JJ., concur.

**CONSTRUCTION OF NOTICE CLAUSE IN ACCIDENT
INSURANCE POLICY.**

Court of Appeals for Montgomery County.

JOHN ROEHM V. AMERICAN CASUALTY COMPANY.

JOHN ROEHM V. EMPLOYERS LIABILITY ASSURANCE CORPORATION.*

Decided, August 6, 1918.

Accident Insurance—Provisions with Reference to Early Notice of Injury Liberally Interpreted in Case of Latent Injuries—Loss of Eye Sight which did not Develop for Ten Months.

1. Under a policy of accident insurance which provides that no claim shall be valid "unless written notice is given * * * within thirty days from the date of sustaining injuries, fatal or otherwise (unless such notice shall be shown not to have been reasonably possible)," is open to the construction that a policy holder will not be required to give notice within thirty days after an accident, if no serious injury was indicated at the time of its occurrence; and where the injury was to the eye sight, which did not become apparent until ten months later, liability attaches if notice was given as soon as the injury developed.
2. Under a policy which provides that notice shall be given at the home office of the company within ten days from the date of the accident, but which contains the further provision that the full amount of the policy shall become payable in case of irrecoverable loss of the entire sight within two hundred weeks, a policy holder sustaining an injury to his eye sight, which did not appear immediately but existed in a latent condition for a considerable period, will be held to be protected.

Breene, Dwyer & Finn, Attorneys for Plaintiff in Error.

McMahon & McMahon, Attorneys for Employers Liability Company.

W. S. Rhotehamel, Attorney for American Casualty Company.

FERNEDING, J.

Both of these cases were brought upon policies of insurance covering accidental injuries.

*Affirmed by the Supreme Court April 2, 1919.

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The petitioners state that plaintiff on or about the —— day of June, 1914, while participating in a game of basket ball was accidentally struck a hard blow in the left eye and that at the time no serious consequences were indicated from the injury.

He consulted a physician at the time, who, after examination, did not consider the injury of a serious nature.

Sometime later, however, he consulted another physician and then learned that as a result of such accidental blow he had lost the greater portion of the sight of said eye. He thereupon immediately notified the company. The sight of this eye gradually diminished and finally failed entirely; it is further averred that as a result of said accidental injury the entire sight of both eyes was irrevocably lost.

The plaintiff avers in said petition that he was entirely without knowledge that said accidental blow had seriously injured his eyes until about the —— day of April, 1915, and that immediately upon receiving such notice, to-wit, April 15, 1915, he duly notified the insurance company.

The court of common pleas sustained demurrers to both petitions and the cases were brought here upon petitions in error.

The controlling question in both cases is as to the failure of the insured to give notice of the accident or injury, within the specified time mentioned in the policy after the accident.

The language of the stipulation in each of the policies as to notice being somewhat different the cases will be discussed separately.

THE EMPLOYERS' LIABILITY INSURANCE CORPORATION CASE.

In this case the "notice" clause is as follows:

"No claim shall be valid on account of any injuries, fatal or otherwise, unless written notice is given to the corporation's manager for the United States at Boston, Massachusetts, or to the agent of the corporation whose name is endorsed hereon, within thirty days from the date of sustaining any injuries, fatal or otherwise, (unless such notice may be shown not to have been reasonably possible), for which claim is to be made, with full particulars thereof and full name and address of the assured or beneficiary, as the case may be."

It will be observed that in this case there is no absolute requirement that the notice be given within thirty days after the accident.

This policy was evidently intended to provide against a harsh or strict construction of this clause and to allow a liberal construction in favor of the policy-holder in cases where "notice" within a limited period was not "reasonably possible."

Counsel for both parties have been diligent in the citations and review of cases both from this and other states, but we think this case rests upon a reasonable construction of the saving clause in the condition above quoted.

This clause is presumed to have been an inducement for the issuing and acceptance of the policy, and, in view of the liberality allowed the policy holder by this clause, we think it would be a reasonable construction to hold that the policyholder would not be required to give notice within the thirty days after the accident, if no serious injury was indicated at the time of the accident.

The petition distinctly avers that while the plaintiff received a hard blow over the left eye, yet no serious injury was indicated and the plaintiff had no actual knowledge of the serious injury to the eye until some months later.

We think it is not reasonable under this policy to require the insured to give notice of every small injury received, but only in cases where some material or substantial injury is reasonably apparent.

Counsel rely upon the case of *Travelers Insurance Company v. Myers*, 62 O. S., 529.

This case is distinguished first in the nature of the notice clause, and second in the fact that in the *Myers* case the insured had full knowledge of the injury at the time of the accident.

We are of opinion that the demurrer in this case should have been overruled.

THE AMERICAN CASUALTY COMPANY CASE.

The policy in this case contained the following:

"Written notice of any injury, fatal or non-fatal, for which claim can be made shall be given to the company at its home

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office at Reading, Pennsylvania, within ten days from the date of the accident."

The argument is made by counsel for defendant in error that this stipulation, being absolute in its terms, must be liberally complied with in all cases before a recovery can be had. Counsel rely particularly upon the Myers case in 62 O. S., 529, and the Coldham case, 2 N. P., 358, affirmed by the Supreme Court, 57 O. S., 657. The Myers case is distinguishable from the case at bar. There the facts were all known to the assured at the time of the accident, and notice was delayed merely because the assured hoped that by making no claim or investigation the injured parties would not bring the action. Later suit was brought against the insured and, when the insured came to assert his claim against the insurance company, it was held that he had lost his claim by failure to give notice provided for in the policy.

In the case at bar under the averments of the petition the assured had no knowledge of the injury to the eyesight for which claim is now made.

The Coldham case contained three limitations, one required immediate notice, one required proof of death in seven months and the other required the action to be brought in twelve months. No action was brought until after thirteen months. The Supreme Court may have affirmed the judgment upon either one of the three limitations. There was no reason for not bringing the action within one year and very little, if any, excuse for not making the proofs of death within seven months.

Taking the decision of Judge Pugsley, as to the giving of immediate notice, there is a distinction between that case and the present, because in that case the beneficiary had notice of all the substantial facts as to the accident and the cause of death, and Judge Pugsley holds that she should have at least notified the company of the information in her possession. It is claimed, however, that the Myers case settles the proposition that a stipulation in a policy as to giving notice must be strictly followed in all cases regardless of the possibility of giving such notice.

While it is stated in the Myers case that the stipulation as to notice must be strictly followed, yet in later cases the Supreme

Court has held that where the terms or conditions of a policy are doubtful they must be construed liberally in favor of the policyholder. *Bank v. Insurance Co.*, 83 O. S., 309; *Webster v. Dwelling House Ins. Co.*, 53 O. S., 558; *Mumaw v. Insurance Co.*, 97 O. S. (O. L. R., April 1, 1918).

It was also held in the Webster case *supra* that conditions of forfeiture are to be liberally construed in favor of the beneficiary.

From the petition the following appears in respect to the accidental injuries insured against:

"If such injuries shall result within two hundred weeks from the date of the accident in the irrecoverable loss of the entire sight of one eye, one-half of the principal sum shall be paid to the insured."

Also the following:

"If such injuries shall result within two hundred weeks from the date of the accident in the irrecoverable loss of the entire sight of both eyes the principal sum shall be paid to the insured."

From this item of the policy it would appear that the loss of the eye sight insured against, was not necessarily one resulting instantaneously and immediately from the accident, but might exist in a latent condition for a considerable period.

The case stated in the petition shows that the injury to the eye was not discovered at the time of the accident or within the period allowed under the express terms of the stipulation for notice to the company.

If a strict and literal interpretation is to be given to the "notice" clause, many cases of injury to eye sight would be foreclosed because of the inability from one cause or another of the claimant to give the notice.

We think a liberal construction of the "notice" clause is reasonably necessary to preserve the main purpose of the insurance.

It would not be fair to assume that either the company or the assured intended by the "notice" clause to foreclose the possibility of asserting a claim so clearly and distinctly conferred by the obligatory terms of the policy.

No cases entirely in point are found in this state, although the following cases show a liberal construction of the "notice" clause:

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Manufacturers Accident Indemnity v. Fletcher, 5 C. C., 633; *American Accident Co. v. Card*, 13 C. C. 154, affirmed by the Supreme Court, 41 W. L. B., 178.

The question has frequently arisen in other states, and while there is conflict upon this question we think the weight of authority sustains a liberal interpretation in favor of the policyholder, and where it is impossible for the policyholder to give notice within the stipulated period it may be given immediately upon discovery of the accidental injury.

U. S. Casualty Co. v. Hanson, 20 Col. App., 394:

"In an action upon an accident insurance policy where at the time of the accident plaintiff thought he was not injured, and for seven months afterwards he and his physicians attributed suffering to rheumatism instead of the accident, his failure to give notice of the injury within ten days as required by the policy would not defeat his action where he gave notice as soon as he learned from a correct diagnosis of his case that his condition was the result of the injury from the accident."

Peoples Mutual Accident Co. v. Smith, 126 Pa., 317.

"His claim was for the loss of his eye, and it is difficult to see how he could with any propriety make such a claim until he had actually lost it, or it had become clear that he would lose it. How could he have truthfully made claim on the fifth of September. And had he done so and his eyesight been restored, the probability is the defendant company would have criticised his claim even more closely than it has done now."

Maryland Casualty Co. v. Ohle, 87 Atl. Rep. 763.

"I see no reason which requires notice to be given of the loss of an eye, until the eye is destroyed, any more than in a life policy a man should give notice of his death before he dies."

Phillips v. Benevolent Society, 120 Mich., 142.

"Notice was sufficient since the member could not be deprived of benefits, in the absence of a definite provision to that effect, by reason of the mistake of his physicians." *Boric v. Railway Officials & Employees' Accident Company*, 119 Fed. Rep., 63.

Smith v. Lyon.

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We have therefore reached the conclusion that under a reasonable construction of the stipulation in the policy as to notice, together with other terms of the policy as disclosed in the petition, the demurrer to the petition should have been overruled.

Judgment reversed.

KUNKLE and ALLREAD, JJ., concur.

ACTIONS FOR ALIENATION OF AFFECTIONS.

Court of Appeals of Lucas County.

SMITH V. LYON.

Decided, March 18, 1918.

Husband and Wife—Limitation as to Time for Bringing Action for Alienation of Affections—When such a Cause Arises—Damages Crim. Con.

1. By virtue of the provision of Section 11224, paragraph 4, G. C., the right to bring an action for alienation of affections is limited to four years from the time the cause of action accrued.
2. The marital relation is invaded and a cause of action for alienation of affections accrues, whenever a third person by enticement, seduction or other wrongful and intentional interference with the marriage relation, deprives either the husband or wife of the consortium of the other.
3. A married woman may maintain an action to recover damages for criminal conversation with her husband.

Jacobson & Sayles, for plaintiff in error.

M. O. Rettig, for defendant in error.

RICHARDS, J.

Heard on error.

The original action was commenced in the court of common pleas by Ida B. Lyon filing a petition to recover damages for the alienation of the affections of her husband. The trial resulted in a verdict and judgment in favor of the plaintiff in the amount

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of \$2,500 and we are asked, because of numerous errors which are claimed to exist, to reverse this judgment.

The case was tried on the third amended petition, the answer thereto and the reply. The original petition was filed on June 27th, 1916, and alleged the marriage of the plaintiff to Hervey C. Lyon on April 25th, 1886, and averred that the marriage relation had continued until June 26th, 1916. On that day Mrs. Lyon and her husband were divorced and on the succeeding day the husband married Sarah E. Smith, and this action was commenced by the divorced wife, Ida B. Lyon. The plaintiff, Ida B. Lyon, and Hervey C. Lyon, are, or were at the time of the commencement of this action, the parents of two grown daughters. The petition further averred that early in the year 1905, the defendant commenced to commit adultery with plaintiff's husband with the wilful and deliberate intention of alienating his affections from his wife. This petition and two successive amended petitions thereafter filed, were held bad, presumably because of the statute of limitations, the pleadings containing the averment that the alienation of affections continued from early in the year 1905. The third amended petition, after setting out the marriage, avers that for the last four years prior to the beginning of the action, the defendant continuously lived in a state of adultery with plaintiff's husband, and that by reason thereof, she has deprived plaintiff of the society of her husband and his assistance and comfort and has wilfully alienated his affections from her.

Although the action was planted and tried as one for alienation of affections, we are met at the threshold of our investigation of the record with the third amended petition which appears to set forth a cause of action, not simply for the alienation of affections, but also for criminal conversation. It is true that at common law the wife could not maintain an action for criminal conversation had with her husband, and neither could she maintain an action for the alienation of the affections of her husband. Under modern jurisprudence, which takes cognizance of the enlarged rights of a married woman, all but two or three of the states of the Union have recognized the right of a wife to

maintain an action for the alienation of the affections of her husband and among the states recognizing that right is the state of Ohio. *Westlake v. Westlake*, 34 O. S. 621.

Under similar principles of jurisprudence, we see no reason why a married woman should not also have the right to maintain an action for criminal conversation with her husband, independent of any question of alienation of affections. The wife's right of action is lucidly discussed and maintained in 13 Ruling Case Law, 1488, the author concluding with the following statement:

"Moreover, under modern statutes, the broad rule has been laid down that a married woman may maintain an action for criminal conversation with her husband, it being said that while the injurious consequences of a wife's adultery may be more far reaching because of probable difficulties and embarrassments in respect of the legitimacy of children, her conjugal rights are in principle the same, substantially, as his, and that, no matter what the ancient doctrine may have been, modern morals and law recognize the equal obligation and right of husband and wife." *Dodge v. Rush*, 28 Appeal Cases, District of Columbia, 149, 8 American and English Annotated cases, 671.

It is true that the first petition in the case at bar was met with a motion to separately state and number the causes of action, which motion was overruled, but the plaintiff filed subsequent pleadings and no further attempt was made to compel a separation of the causes of action, and the case was tried and the jury charged as if the action were one for the alienation of affections only.

The answer consisted of a general denial and a plea of the statute of limitations, but the charge omits all reference to the statute of limitations, although much of the evidence that was introduced related to transactions occurring many years prior to the commencement of the action, some of them, indeed, extending back as far as the date which had been set out in the original petition filed by plaintiff, to-wit: the year 1905. By virtue of the provisions of the General Code, Section 11224, paragraph 4, the right of action for the alienation of affections is limited to a

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period of four years after the cause of action accrued. An important question of fact therefore arose in the case as to when the cause of action accrued. The action being one for alienation of affections would evidently accrue when the affections were alienated. The right to bring an action would then arise and when that right arose, the statute of limitations would begin to run. The gist of an action for alienation of a husband's affections is the loss of the society, affection and consortium of the husband. Just when the right to sue accrued was, of course, a question of fact to be determined by the jury. The defendant contended that the right arose in 1905. This question should have been submitted to the jury under proper instructions as to the law. 1 Encyclopaedia of Evidence, 760.

If the right arose in 1905, it was, of course, barred by limitation. when the action was commenced in 1916, unless the offense was condoned and the affections reinstated and again alienated within the statutory period of four years prior to the commencement of the action. The question is very clearly discussed in *Farneman v. Farneman*, 46 Indiana Appellate Court Reports, 453, which case was cited with approval by the Supreme Court of Indiana, on October 11th, 1917, in the case of *Fidelity & Casualty Company v. Jasper Furniture Company*, 117 Northeastern Reporter, 258. See also 25 Cyc. 1148; *Bockman v. Ritter*, 21 Indiana Appellate Court Reports, 250; *Hogan v. Wolf*, 10 N. Y. Sup., 896; *MacFadden v. Olivant*, 6 East's Reports, 448. In this last case, Lord Ellenborough used the following language:

"The cause of action in these cases arises from the time of the injury done by the defendant, by the corruption of the body and mind of the wife; for from that time she is less qualified to perform the duties of the marriage state."

The invasion of the marital relation which gives rise to a right of action independent of the question of Crim. Con. is clearly stated by Donahue, J., in the course of the opinion in *Flandermeyer v. Cooper*, 85 O. S. 327, 341, in the following language:

"This right is invaded whenever a third person through machination, enticement, seduction, or other wrongful, inten-

tional and malicious interference with the marriage relation deprives the husband or wife of the consortium of the other."

See also *Sanborn v. Gale*, 162 Mass., 412, although we think the rule is not very cautiously stated in this last case, as an action for alienation of affections will lie although the wrongful conduct was not accompanied by adultery.

While the last amended petition limited the complaint to the period of four years, yet the evidence that was introduced covered, as has been said, a much longer period of time and the charge permitted the jury to assess damages for alienation of affections, regardless of when it occurred, and scrupulously avoided giving the jury any instructions on the subject of Crim. Con.

The charge of the court contains instructions to the jury on the subject of a common law marriage between the defendant and Hervey C. Lyon. We are unable to see how the existence or non-existence of a common law marriage between them could, in any wise, affect the rights of the plaintiff below.

The judgment will be reversed and the cause remanded for a new trial.

CHITTENDEN and KINKADE, JJ., concur.

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**RIGHT OF INHERITANCE UNDER A TECHNICALLY
IMPERFECT ADOPTION.**

Court of Appeals for Cuyahoga County.

PORTER H. W. TAYLOR V. EDWARD BUSHNELL, EXECUTOR, ET AL.*

Decided, February 7, 1919.

*Adoption—Inheritable Quality of an Order of—Where the Proceedings
Fail to Disclose Consent of the Mother or any Reference to Her—
Collateral Attack—Presumption as to What the Court Found.*

1. Attack on an order of court, entered in a case in which the petition was jurisdictionally sufficient, is in the nature of a collateral attack and is subject to the rules applicable thereto.
2. Where a petition asked for relief which the court had the power to grant, and a decree was entered in accordance therewith, it will be presumed in subsequent collateral proceedings that all incidental questions were duly considered.
3. The right to inherit from a foster parent is not defeated by the absence from the proceedings of adoption of assent thereto on the part of both of the natural parents.

Walter C. Ong, Esq., Counsel for plaintiff in error.

Messrs. Cook, McGowan & Foote, contra.

GRANT, J.

Error to the court of common pleas.

The plaintiff—both in error and below—was in the lifetime of Mary S. Bradford and at her death, a collateral relative of the latter, to-wit: a cousin-german. In default of descendants in the direct line, upon her decease he would have been her heir at law, upon whom, if she had died intestate, her estate would have been settled by devolution to him.

Mary S. Bradford at her death left a paper in due form of her last will and testament, and purporting to be such, and which as

* Motion to direct the court of appeals to certify its record in this case overruled by the Supreme Court, March 25, 1919.

her last will has been duly admitted to probate and proved in the court to which the jurisdiction for that purpose appertained. The defendant Edward Bushnell was named by the will as its executor and also as trustee to carry out certain of its provisions; he has duly qualified in both capacities and has entered upon the duties thus cast upon him. The defendant Ella Bradford Brown is a legatee and devisee under the will. The plaintiff is not a beneficiary under the will, nor is he named in it.

This action, in origin, was to contest the will and have it declared void and inoperative in the disposition of any of the estate that was of Mary S. Bradford, deceased. All proper parties were made defendants.

A motion was made in the court below to abate the action and dismiss the petition, on the ground that the defendant Ella Bradford Brown is the only child and sole heir at law of the testatrix, so that, even if the contention of the plaintiff were to prevail, all the property involved in the suit would pass to her under the statutes of descent of Ohio; reduced to its lowest terms, the contention of the motion was to the effect that in no event could the plaintiff be said to be a party in interest in the case.

The plaintiff controverted, as matter of fact, the heirship of Ella Bradford Brown to the testatrix. This decisive question of fact, determinative of the right of the plaintiff to sue, and hence of the case, was heard below. The finding was that the facts upon which the motion depended were made out and it was sustained. As this disposed of the entire controversy, final judgment dismissing the petition was entered.

To reverse that judgment this proceeding in error is prosecuted here.

From the foregoing recital it will be seen that the sole question presented by this record is whether the defendant Ella Bradford Brown was the child, and is the sole heir at law of Mary S. Bradford, the testatrix. It is not claimed that she was the born child of the decedent, but she relies for her heirship on an adoption duly made, whereby the status of daughter to the testatrix was created as matter of law, so that upon the death of the adopting

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parent, and no will intervening, the succession of the property of the latter would pass to her by operation of statute.

To rebut this claim and defeat the devolution of the estate, in case the contest of the will should prevail, upon the claimed heir by adoption, the adoption itself is attacked as being null and of no effect in law.

The purported adoption arose and became effectual, if at all, by virtue of a judgment in due form of the probate court of Cuyahoga county, Ohio, entered on the 13th day of August, A. D., 1866, the record of which appears here.

The claim is that this judgment is void for want of jurisdiction to render it, so that it may properly be called in question in this action, although it still remains unreversed of record.

As the question is important, although not difficult, as we regard it, we feel justified in exhibiting fully the facts upon which the case proceeds and our own conclusion must depend.

The statute of Ohio in respect of adoptions, in force at the time the one controverted here purported to be had, was as follows:—S. and C., 506.

“Any inhabitant of this state not married, or any husband or wife, jointly, may petition the probate court of their proper county for leave to adopt a minor child, not theirs by birth, and for a change of the name of such child, but written consent must be given to such adoption by the child if the age of fourteen years, and by each of his or her living parents who is not hopelessly insane or intemperate,” etc.

The petition upon which the judgment and order of adoption was finally entered, omitting the caption, was as follows:

“William Bradford and Mary S. Bradford, wife of said William Bradford, respectfully represent and state to your honor, that they are desirous of adopting as their child, Ella Scranton, who is a minor of the age of eight years, and the child by birth of Abel Scranton, the father of said child, and who resides at Brighton, in the county of Lorain, and state of Ohio, has given his written consent to such adoption of said child by your petitioners, and to such change of her name as aforesaid; that your

petitioners are of sufficient ability to bring up and educate said child properly."

This was signed by both petitioners.

The only answer in the matter was in the following language:

"I, Abel Scranton, the father of the above mentioned child, Ella Scranton, who is a minor child of the age of eight years, do hereby consent to the adoption of said child by William Bradford and Mary S. Bradford his wife, and to the change of her name from Ella Scranton, her present name, to Ella Scranton Bradford, according to the prayer of the foregoing petition.

(Signed) Abel W. Scranton.

Cleveland, March 2, 1866."

Thereupon an entry, constituting the final judgment said to be void, was made in the journal of the probate court, as follows:

"This day came William Bradford and Mary S. Bradford, and moved the court for the adoption of Ella Scranton, aged eight years and thereupon this cause came on to be heard upon the petition of William and Mary S. Bradford and the answer of Abel Scranton, the father of said minor child, And the court find upon examination of said Abel Scranton, that he of his own free will and accord desires the adoption of said minor child. And the court is satisfied from the testimony that the petitioners are of capacity and ability to bring up and educate said minor in a suitable and proper manner, having reference to the degree and condition of said child's parent; and the court is further satisfied of the fitness and propriety of said adoption. The court do therefore order, adjudge and decree that from and after this date, the said minor child, to all legal intents and purposes, shall be the child of the said petitioners, and that the name of said child be changed from Ella Scranton to Ella S. Bradford."

It will be seen that the record does not affirmatively show that the consent of the natural mother of the child, if she was then living and not insane, was ever given to the adoption.

The claim of the plaintiff that the judgment of adoption was void *ab initio*, is set forth in his brief, as follows:

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"Now the portion that must appear in the petition or in writing underscored herein can not and does not relate to anything other than to give to the court jurisdiction upon the filing of the petition when the facts are set forth therein that the written consent has been or is given to such adoption by the child, and by such of his or her living parents, who is not hopelessly insane, etc. * * *

"There is no allegation in the petition or request that the child by birth was the child of Abel Scranton, and the child's mother, Mrs. Scranton. There is no allegation in the petition or request setting forth even the color of an excuse for not having the written consent of such adoption of the child's mother.

"Now the language of the statute is clear, certain and definite that there must be a written consent by each of his or her living parents (in the plural) who are not hopelessly insane, etc. Now this being true, jurisdiction never attached at all in the court where the petition omits the essential and necessary allegation to give jurisdiction. The fact that Abel Scranton, the father of the child, gave his written consent to the adoption of the child, by your petitioners, in no way clothes the court with jurisdiction, because he is only one of the parents, and the statutes expressly provides that both shall consent.

"Further, there is not one word in either the application or the journal entry, that any notice of any kind or character, summons or otherwise, was ever given to the child's mother, nor did she in any way ever appear in court to be heard as to the disposition of her child. Now, if this is true, and it is, what jurisdiction did the probate court in 1866 receive or was clothed to give and do what the record of that court says and sets forth was done.

Where the child to be adopted is under the age of fourteen years, the appearance in court, and the consent of the child's parents brings the child before the court by the acts of its parents, and the court then and then only acquires jurisdiction over the child, and the parents of the child in this case Abel Scranton, the child's father, and Mrs. Scranton, the child's mother.

It further appears by the record that Abel Scranton, the father of the child Ella Scranton, a minor child of the age of eight years, did by his answer consent to the adoption of said child by William Bradford and Mary S. Bradford, and to the change of her name from Ella Scranton, her present name to Ella S. Bradford. There is no answer of the mother of Ella Scranton, there is no consent of the mother of Ella Scranton; she never was notified and never was heard in court in this proceeding, which was

adverse to the child, as well as the parents of the child Ella Scranton."

Let us examine this extreme claim that the judgment is void in the light of principle.

It is first to be observed that the adoption proceeding is in no just sense adversary in character, although it can not be said to be *in rem*, strictly speaking; it is *quasi in rem*, or, as the old books would say, *sounding in rem*.

So far as the here wanting natural mother is concerned, the proceeding, if valid, divested her of no property right, or any right except that of filial obedience and duty on the part of the child, and that right, as the law stood in 1866, before the legal emancipation of married women in Ohio, was a shadowy right, having little or no substance as long as the wife was under the overpowering paramountcy of the husband and the disabilities of coverture at common law. The question of what obligation of duty the proceeding cast upon the adopting parties is not material here, as they were in no default in the steps taken in the direction of jurisdiction. The chief person in concernment was the child, and the advantage accruing to her from the proceeding, if it is not avoided here, turns out to have been considerable, and in return for which she, so far as appears, yielded the full consideration of service, duty and obedience, through many years, to her adopters, and of which the plaintiff by this suit seeks to deprive her—he purporting to be in law the successor in right to the adopting parents who received the service. This measures the merit of his contention, carried to its result as to her.

Jurisdiction, shortly stated, is the power to hear and determine. As to the subject of it, it must either reside inherently in the court which undertakes to exercise it, or it must be created by law. There is no doubt that constitutionally it may in Ohio be conferred by statute upon the probate court, as it has been conferred by the Legislature in the act mentioned. There was, therefore, the power to hear.

In that statute it is particularly to be noticed there is an entire absence of what the petition must contain as the first and only

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step towards the exercise of that jurisdiction which the act has conferred; it must ask for the adoption of a minor child not the proposed adopter's by birth. The simple asking is enough to set the machinery of the jurisdiction created by law in motion in the direction of granting the prayer.

All things else are matters to be supplied, either at the motion of some one who wants more in the petition or by the evidence produced.

While the contention of the brief is that the petition must contain much more in order to invoke the jurisdiction of the court to find effect, we do not find any such requirement, in the light of the enabling statute.

In Ruling Case Law, Vol. 1, p. 603-4, it is said:

"It has been ruled that the petition for the adoption of a child must be liberally construed; that facts not averred in it may be supplied by caption; that the facts disclosed need not be other than expressly required by the statute; and that, even as to conditions precedent necessary to support the adoption, such conditions need not be set forth in the petition unless the statute so requires."

This consideration appears to us to much impair, if not to destroy the value of the authorities cited in the brief from states other than Ohio,—we not having their correlative statutes to inspect and guide us.

As to jurisdiction of the parties, the constitutional requirement is due process of law; which is made up of notice and an opportunity to be heard, before rights can be judicially defeated or interests cut off. But this condition precedent to the exercise of jurisdiction can be predicated only of adversary proceedings, and for the benefit and protection of an adversary party in matter of substance and not of form only.

We have now reached a point in this discussion where it may be asked whether,—the filing of a petition being enough to set the wheels of jurisdiction in motion—the other steps necessary to complete the operation of the statute make effectual its declared purpose and advance the remedy it gives, may not be

supplied by allowable legal intendent, or inference, or presumption, favoring jurisdiction, under the rule quoted, as against the attack made on the jurisdiction in this case,—a mode of attack which, since we find the petition jurisdictionally sufficient, we must regard as collateral and not direct. We may meet and answer this inquiry, as we think, without determining whether the fact that the natural mother of the child is not named as affirmatively consenting to the adoption and does not appear as having notice of the proceeding, in the absence of the muni-ments of presumption, would be decisive of the case or not. Before, however, proceeding to consider in the light of authority, the question of how far a presumption has arisen here which will protect the judgment assailed at the bar against this mode of assault, we desire to view the matter from another point of view, from which we may, as we think, also reach a satisfactory conclusion.

The one who makes the attack must be looked at, as would be the case if Mrs. Bradford were here trying to defeat a right of Ella Brown, accruing to the latter as the result and consideration of a contract, her part of which has faithfully been performing for more than a half century. Would Mrs. Bradford be heard to put forward the infirmity that Ella's mother is not by record shown to have joined in an answer in adoption—although the natural mother may have been unable to so join because she was then dead,—after she, Mrs. Bradford had received all that the law required the child to give in return for the right to inherit, which Mrs. Bradford vicariously through the plaintiff, is attempting to do? What standing would she have—and therefore what standing does *he* have—in a court of conscience? We think this material inquiry is answered in *Chehak v. Battles*, 133 Iowa, 107.

By the Iowa statute in force at the time, the adoption was required to be evidenced by a deed duly executed, acknowledged and recorded. In that case the deed was signed, but the signatures were not acknowledged, nor was the instrument ever recorded. The child lived for years with the adopting parents

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and fully performed the obligations cast upon her by the deed of adoption, although of course she was in person no party to it.

After their death advantage was attempted to be taken of the infirmity mentioned, to defeat her right of inheritance under it. We can see no difference in substance or principle between that case and this case.

The syllabus is as follows:

“An instrument whereby, in consideration of the surrender to them of a child, parties accept the duties of parents to the child, and agree that it shall have all the rights of inheritance by law, may be specifically enforced as a contract as to the right of the child to receive a share of the estate, though it is invalid as an instrument of adoption because not acknowledged and recorded as required by the laws in force at the time of its execution.”

Another holding in the case was that the instrument was not within the statute of frauds and could not be avoided as being in the nature of a testamentary disposition of property.

But the case at bar was not argued, as we recollect, from this point of view, and we shall not let our disposition of it rest on this consideration alone; although we might safely do so, as we think.

Its other aspect—the one in which the cause has been mainly argued—concerns the nature of the attack on the jurisdiction of the probate court of Cuyahoga county,—whether the attack is collateral or direct.

We have seen that the court had jurisdiction of the subject by creation of law, and that its exercise was invoked and set in operation by the filing of a petition sufficient under the statute. Jurisdiction, therefore, attached by the taking of that step towards it. This conclusion denies, necessarily, the contention that there was no jurisdiction. It seems to follow that the present action attacks that jurisdiction collaterally instead of directly. Whether the jurisdiction was exercised effectually or not, is another question.

The only instance we have found in the books which seems to countenance such a proceeding as we have here in the light of a

direct attack on the judgment in adoption, is *Willis v. Bell*, 86 Ark., 473.

But the proceeding there was habeas corpus, and the writ was allowed because the mother had not been notified in the adoption case and she sued to get possession of her child; it was not a suit to defeat the inheritable quality which the adoption judgment created if jurisdiction was present effectually, by any showing known to the law.

In *Re Camp's Estate*, 131 Cal., 469, it is remarked:

"It is a well settled rule of law that where the jurisdiction of an inferior or special tribunal, or its power to act in any particular case, depends upon the existence of a fact which is to be established before it by extrinsic evidence, the determination of that fact by the tribunal can not be questioned in a collateral attack on its order."

Wells, Jur., Section 61, and cases cited.

In *Richardson v. Matteson*, 8 So. Dak., 77, it is said—p. 80:—

"If silent as to jurisdictional facts, the order of adoption relied upon, having been made by a court of record, clothed with original jurisdiction of the subject-matter, its authority and jurisdiction will be presumed, unless by necessary implication from the recitals of the order it appears that something essential to the jurisdiction had been omitted, or that the required statutory conditions did not exist."

Let us apply the test thus propounded to this case. The order of adoption was made by a court of record having jurisdiction of the subject-matter. What is left to give rise to the presumption which will validate the order? From the recitals of the order does it appear "by necessary implication" that any remaining thing "essential to the jurisdiction" has been omitted or that "the statutory conditions" to the adoption did not exist when the order was made?

If it is said that the consent of the mother is wanting, the answer is that such consent is not *in all cases* an essential to jurisdiction, or a statutory condition which must under all circum-

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stances be present in order to make the judgment of adoption effectual. If the mother was at the time dead; if she was then hopelessly insane; if she had then abandoned her child—in none of these contingencies was her consent indispensable, or requisite, or possible. The provision of the statute for a representative to act for the incapable parent, in any case, may be presumed to have been complied with, so long as the order does not show “by necessary implication” that it has not been complied with—the court having original jurisdiction of the subject-matter,—according to the case last cited. We are of the opinion that, favoring a judgment, such presumption is to be indulged here—no recital of the order asserting or implying anything to the contrary.

We are, however, relieved, as we think, from all uncertainty of conclusion in accordance with the rule we have thus endeavored to extract from the authorities, from a consideration of another case, which apparently is exactly in point and which seems to us to resolve even a lingering doubt. It is the case of *Wilson, Administrator, v. Otis et al.*, 71 N. H., 483. It was an appeal from a judgment in distribution in the probate court. The brothers and sisters of the intestate claimed the entire estate as his heirs at law. One who claimed to be a son by legal adoption contested their right to inherit on the ground that he was the sole heir. The legality of the adoption proceeding was challenged and passed upon by the court.

The petition for adoption was filed in 1882 and was in the usual form, except that the father consented—as he did—and that his wife was then divorced from him, without a reservation in the judgment of divorce of the custody of the child.

An order of adoption was made, but was not entered on the journal of the court, and both it and the petition and the files in the case were taken to a lawyer's office where they remained undiscovered for fifteen years, when they were looked up, the adopting father, with whom the child had been living, being then dead and doubts as to the heirship being then cast upon the reputed son. The entire order of adoption, which was then brought out and put to record, was in the following language:

STATE OF NEW HAMPSHIRE.

Strafford, ss. At a court of probate held at Rochester in said county on the seventeenth day of January, A. D. 1882: On the petition of George W. Otis and Addie F. Otis, both of Farmington in said county, praying for leave to adopt as their own child Arthur H. Edgerly, of Wolfeborough, in our county of Carroll, the child of William A. Edgerly and Sarah F. Edgerly, and that a decree to that effect may be made, it appearing to the court that said Arthur H. Edgerly is the child of said William A. Edgerly and Sarah F. Edgerly and is under fourteen years of age, and that said — the parents of said child, having consented in writing to such adoption, and the court being satisfied of the identity and relations of the persons, and that the petitioners are of sufficient ability to bring up said child, and furnish suitable nurture and education, having reference to the degree and condition of its parents, and that it is fit and proper that such adoption should take effect:

It is therefore decreed that the said — have leave to adopt said child as h—, own child, and that the name of said child be changed to — and it is hereby ordered, that from the date hereof, said child shall, to all legal intents and purposes, be the child of the said — and shall hereafter have the name of —.

J. D. Young, Judge of Probate.

We call attention to the blanks appearing in this judgment, which lacks the quality of affirmatively showing a consent by either parent or by any one.

But every phase present in the case at bar important in this consideration, was dealt with and passed upon by the court in the opinion, which proceeds as follows:

“The question raised by the case is whether the defendants are entitled to inherit a part of the estate; and this depends upon the question whether Arthur was legally adopted by the deceased. If he was legally adopted, it is conceded that he would inherit the estate subject to the widow's rights and to the exclusion of the defendants. G. L., c. 188, s. 4. Their contention is that there was no valid judgment or decree of adoption by the probate court, in which the deceased entered a petition for that purpose. It is found as a fact, that upon that petition the judge of

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probate did judicially what the imperfect document signed by him, upon a reasonable construction thereof, shows he did. If upon competent evidence it appears that the court, having jurisdiction of the subject-matter, determined the issue or point presented by the petition, the parties are concluded thereby. Whether the judgment was actually entered up in the technical form of a decree, is not material in this collateral proceeding. *Nihan v. Knight*, 56 N. H., 167.

"Did the court grant the prayer of the petition? It appears from the record that the court, presumably upon competent evidence, found certain facts which were essential to a decree of adoption. G. L., c., 188, s. 3. These facts are expressly recited in the signed document, which, taken in connection with the petition, indicate with much force that the judge understood that he had decided the question of adoption, and that nothing remained to be done except to enter up a formal decree. The signing of the blank form of a decree of adoption as a part of the record would be inconsistent with a judgment denying the prayer of the petition, and would not indicate that the court was in doubt as to what the final order should be. Nor is it reasonable to infer that the judge did not attach any importance to this document—that he regarded it as a waste piece of paper. Having some significance, it must be deemed to indicate the judge's finding upon the petition in favor of adoption. As he had made specific findings of fact relating to the merits of the action and signed a blank decree, the work of filling up the blanks was merely clerical, requiring the exercise of no judicial function. If he had entered a minute on the docket to the effect that 'the petition is granted; that would have been conclusive evidence, in a collateral proceeding, of the judicial act of rendering judgment in accordance with the prayer of the petition (*State v. Narcarm*, 69 N. H., 237; *State v. Cox*, 69 N. H., 246; *Matthews v. Houghton*, 11 Me., 377; *Felter v. Mulliner*, 2 Johns. 181; *Fish v. Emerson*, 44 N. Y., 376, 378; *Swain v. Gilder*, 61 Miss. 667, 671; *Overall v. Pero*, 7 Mich. 315; *Lynch v. Kelly*, 41 Cal., 232, 233); but such evidence would be no more convincing than the evidence furnished by the record in this case. Upon a reasonable construction of the record, the fact that a judgment of adoption was rendered is not susceptible of serious doubt. *Freem* Judg. (4th ed.), s. 45; *McDonald v. Frost*, 99 Mo. 44, 48.

"The fact that the petition with the blank decree at some time after the hearing was taken from the files or from the possession

of the judge, and was not returned for some years, did not have the effect of invalidating the previous action of the court. The record, having been restored, is as competent and conclusive evidence of the judgment as though it had remained on the files.

But it is insisted that the judge of probate had no jurisdiction to decide the question presented, or to render a judgment thereon, because it does not affirmatively appear in the record that the mother of the boy consented in writing to the adoption as required by the statute. G. L., c. 188, s. 2. This fact, however, is not necessarily essential to the exercise of jurisdiction by the probate court. If the parent has abandoned the child for three years, his consent to adoption proceedings is rendered unnecessary by the statute. G. L., c. 188, Section 2. It is for the court, after having acquired jurisdiction by the filing of an appropriate petition, to decide in the first instance whether the parent has consented to a decree of adoption; if not, whether there is any valid excuse for his non-action, as death, insanity, or other disability; or whether he has so far abandoned his parental duties for three years as to render his consent unnecessary. These, with other preliminary questions that might be suggested, must be determined upon evidence and a hearing by the judge, after he has acquired jurisdiction of the general subject-matter of the petition. The filing of the petition and the appearance of proper parties gave him, under the statute (G. L., c. 189, Section 4), power to act judicially. *Horne v. Rochester*, 62 N. H., 347, 348, 349; *Spaulding v. Groton*, 68 N. H., 77, 78. The court was not asked to do what it has no judicial power to do under any circumstances. It became its duty to act upon the subject-matter presented, and to receive evidence upon all material questions suggested, among others upon the question of abandonment as an excuse for the failure of the mother to consent to a decree of adoption. *State v. Arlin*, 27 N. H., 116, 129. If its decision was erroneous upon this question, the error did not render the proceedings absolutely void (*State v. Richmond*, 26 N. H., 232; *White v. Landaff*, 35 N. H., 128, 130), so that they might be disregarded in a collateral suit. The error if there was one, was correctible by appellate procedure, and does not prove a want of jurisdiction in the probate court. *Fowler v. Brooks*, 64 N. H., 423, 424; *Kimball v. Fisk*, 39 N. H., 110.

"Nor does the absence in the petition of an allegation of abandonment, or of the mother's consent, effect the question of general jurisdiction. It is not necessary that the petition should contain a full statement of all facts essential to a decree. It might

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seriously fail in this respect, or be demurrable, and still state a case calling for and requiring the exercise of the judicial power of the court. The test has been said to be, not whether it states a perfect case, but whether the court has the power to grant the relief sought in a proper case. Van Fleet Col. At., Section 61. If upon a petition for adoption which omits these allegations the court finds the fact of abandonment, as well as other necessary facts, its decree of adoption is valid. The judgment or decree necessarily implies a finding of all material facts not inconsistent with the record, one of which may be the fact of abandonment. In this case, as the finding of that fact is not inconsistent with other facts disclosed by the case or the record, it is included in the general finding in favor of adoption, and furnishes a valid excuse for the non-consent of the mother. *Erwin v. Lowry*, 7 How. 172; *Florentine v. Barton*, 2 Wall., 210, 216; *Thornton v. Baker*, 15 R. 1., 553. The judgment of adoption, therefore, is not impeachable in this proceeding."

We have quoted thus extensively from the New Hampshire case, partly because it appears to us to leave no important question involved in this case unanswered, and in part because before finding it we had really, in a manner, anticipated some of its discussed doctrines as to the consequences flowing from a statutory grant of jurisdiction of the subject of adoption when it is once set in motion by a prayerful petition invoking its exercise clear through to the end.

The law of the case, as declared by the syllabus, appears to us to meet and dispose of every contention urged upon our attention in the case at bar.

The syllabus reads thus:

"A decree of adoption is not invalid because it does not recite nor the petition allege, an assent by the parents or facts excusing their assent.

"Where a petition asks for relief which the court has power to grant, and a decree is made, it will be presumed, in collateral proceeding, that all incidental questions were duly considered."

Applying this law to the matter in hand, and how stands this case?

Our decree of adoption does not recite, nor does the petition allege, an assent to the adoption by both parents, and no facts are put forward to account for the want of consent. The judgment operating an adoption in law is not, for that reason, invalid.

The petition asked for relief which the court had power to give. A decree granting it was made. Without more, the law presumes, in a collateral proceeding, that all things necessary to reach the end sought have been done upon due consideration by the court clothed with the power to advance the remedy and grant the relief sought.

We know of no authority—can think of none—that more concretely squares with the case under review here.

Its conclusions—justifying ours—do not commend themselves the less to a court because in each case the attempt to defeat a consummated and earned adoption and its benefits, was made by one who sought, by a supposed fortuitous slip in the law's meshes to reap where he had not sowed and to gather where another had strown.

We find no error in the judgment complained of, and that it does substantial justice. It is affirmed.

DUNLAP, J., and WASHBURN, J., concur.

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BOY INJURED WHILE SHIFTING A BELT.

Court of Appeals for Cuyahoga County.

CARL SAWITZKE V. THE PETERS MACHINE & MANUFACTURING
COMPANY; andTHE PETERS MACHINE & MANUFACTURING COMPANY V. CARL
SAWITZKE.*

Decided, December 16, 1918.

Jurisdiction—May be Controverted by Evidence—In Spite of Recitals in the Record of the Court Below, When—Minor Without Capacity to Appear as Plaintiff in an Action for Injuries—Or His Mother, Appearing as His Next Friend, to Waive any of His Rights—Direct and Collateral Attack on Judgments.

1. Extrinsic evidence is competent as to failure to obtain jurisdiction in the court below, notwithstanding it contradicts the record of the inferior court, where the allegations are to the effect that the defendant employer brought into court the plaintiff, an injured minor, together with his mother as next friend, and the form of a trial was had and judgment entered in favor of the minor for a small sum as compensation for his injury, the purpose being to give validity to a proposed settlement for said sum, neither the said minor or his mother having any understanding as to what was being done and no assistance from counsel.
2. A judgment is not against the weight of the evidence, where it is for injuries sustained by a boy sixteen years of age who was required to shift a belt with his hand and it was in dispute whether he had been properly instructed as to how the shift could be made with safety.

Howell, Roberts & Duncan, for plaintiff.
Guthery & Guthery, contra.

WASHBURN, J.

Heard on appeal from the court of common pleas and on error from the court of common pleas.

*Motion for an order requiring the court of appeals to certify its record in this case overruled by the Supreme Court, February 25, 1919.

Carl Sawitzke recovered a judgment for thirty-five hundred dollars (\$3,500) against the Peters Machine & Manufacturing Company in an action for damages for personal injuries suffered by said Sawitzke while in the employ of said company.

The petition set forth two causes of action, one, in equity, to set aside a settlement and a judgment of a justice of the peace, which it was claimed merely confirmed and carried into effect such settlement, and the other cause was the usual action for personal injuries.

The equity action was tried in the court below and appealed to this court by the company as case number 2247; the action at law is before this court on error proceedings as case number 2316.

It is conceded that if Sawitzke fails in the equity action he fails entirely. His claim in the equity action was that when sixteen years of age he was injured while in the employ of the company, and that a few weeks after the accident, at the instance and request of an attorney for the company, his mother, as his next friend, undertook to settle his claim for damages, which resulted in an alleged judgment for \$82 being entered against said company and in favor of Sawitzke in a justice of the peace court, and it is conceded that said judgment was by said company paid in full to the mother of Sawitzke as his next friend; that the proceedings of the justice of the peace, while in form an action at law, in fact was merely a means used by the company to obtain a release binding upon Sawitzke, a minor and was in fact a proceeding instigated and carried through by said company for its benefit, and that while he and his mother apparently consented to the same, they had no attorney and were entirely ignorant of what was being done; that the attorney for the company assumed to act for both parties and that he failed to inform them and make them understand the nature of the proceedings, and that his conduct amounted to a deception and fraud by which apparent jurisdiction was acquired by the court, when in fact the court acquired no jurisdiction, and that their lack of representation and their non-participation in the proceedings, in view of the disability of the infant and the legal inability of the mother as next friend to enter into any com-

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promise or settlement or do anything to waive or change the infant's rights, rendered said proceedings a mere sham without substance, and that in fact there was no suit and consequently no valid judgment.

It is quite easy to extract from the evidence the real truth as to the important and controlling facts, but we are met on the threshold of the inquiry with the contention of the company that insomuch as it appears by the record of the justice of the peace that the court had jurisdiction of the parties, no extrinsic evidence is admissible to contradict the presumptions or recitals of the record.

The record of the justice of the peace is to the effect that the plaintiff in that court filed a bill of particulars, and that the defendant entered its appearance, and then the record reads:

"Plaintiff sworn and heard; no defense; trial had; wherefore on said day it is considered that the said plaintiff recover of said defendant the sum of \$82 damages, and the costs of this suit herein, taxed at \$1.50."

We find the rule of law on this subject to be that when the judgment of an inferior court is drawn in question in any *collateral* way, and the record shows on its face that jurisdiction of the parties was obtained, then the record imports absolute verity and extrinsic evidence is not competent to contradict the recital of the record; but when the judgment is *directly* attacked for want of jurisdiction, such want of jurisdiction may be shown, though it be in contradiction of the record.

The difficulty lies in determining what is a direct and what is a collateral attack. It is said that a direct attack is one by which the judgment is directly assailed in some mode authorized by law.

We regard it as settled that a judgment may be impeached in a suit instituted against the party through whose means, and by whose procurement a fraudulent judgment is obtained, where such fraud amounts to a fraud on the court as well as on the opposite party, and that such a proceeding is a direct attack upon the judgment, and in such a case extrinsic evidence is admissible though it contradicts the record.

The question is, do the allegations of the petition bring the case within the rule of a direct attack? As we view it, the complaint attacks the foundation of the judgment in question—the jurisdiction of the justices of the peace.

If jurisdiction was conferred upon the justice, it was by plaintiff's filing a bill of particulars and knowingly participating in the trial as such plaintiff.

The petition alleges that the bill of particulars was not filed by Sawitzke or his mother, but was filed by the company, and that Sawitzke and his mother did not participate in a trial—that in fact no trial was had, and that said judgment was rendered upon the confession of the company and without the will or consent of Sawitzke or his mother, and the prayer is that the judgment be adjudged to be void and of no effect.

The fraud alleged consists in the attorney for the company, without any authority so to do, assuming to file a bill of particulars on behalf of Sawitzke, when Sawitzke and his mother were wholly ignorant of the proceedings, and in assuming, while really representing the company, to act also for Sawitzke and his mother in instigating and participating in a pretended trial, when in fact no trial was had.

In this connection, it is well to keep in mind the fact that Sawitzke's infancy precluded him from making any binding agreement of settlement or taking any part in a court proceeding which would be binding on him; and that his mother, neither as next friend nor as guardian for the suit, could waive any of his rights or enter into any agreement or arrangement binding on him; the office of next friend is solely to bring the infant into court because of his legal inability to present his own case; the next friend can do nothing which may injure the rights of the infant and his admissions are not binding upon the infant; the next friend can not release a cause of action, nor compromise, nor submit it to an arbitration.

We hold that under the allegations of the petition the evidence objected to is competent, and that the evidence establishes facts which constitute legal fraud in the procurement of said judgment, and that the same should be set aside, and it is so ordered.

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In the error proceedings we find that there was no error in the action of the court below in setting aside said judgment.

The other error complained of in the trial of the case to the jury is, that the verdict and judgment are against the weight of the evidence in that there was no evidence of negligence on the part of the company.

The negligence complained of was that Sawitzke, who was an infant sixteen years of age, had had no experience in the handling and operating of machinery and was wholly inexperienced and ignorant as to the dangers in connection with the shifting of belts which was a part of the work he was employed to do, and in the doing of which he received his injuries, and that the company negligently and carelessly set him at said work without giving him any instructions or warning and without showing him the safe and proper way to do said work and to shift the belt when necessary to be done in the performance of said work, and that said company, in violation of the statutes of Ohio, negligently and carelessly failed to have upon the machinery operated by him in the performance of said work, or in connection therewith, any shifter to be used in shifting the belt upon the pulleys in the operation of said machinery, and required him to do said work of shifting said belt by using his hand, which was a dangerous and unsafe method of performing said work.

The defense pleaded in this branch of the case was a denial of negligence and that the injuries were caused or contributed to by the negligence of Sawitzke.

The claim of the company is that the evidence discloses that there was no negligence in not instructing Sawitzke, because he had performed the operation of shifting said belt frequently every day and at the time of the injury had performed the operation four or five hundred times.

But the evidence also disclosed that the accident was caused by an unusual occurrence in that, after he had shifted the belt at the top and was in the act of shifting it at the bottom, it jumped back on to the cone at the top from which it had been shifted, and thereby his hand was caught and jerked in between the belt and the cone, causing the injury; and there was evidence

that he was not instructed and there was also evidence on behalf of the company tending to prove that he was instructed.

Under such circumstances, it was peculiarly a question for the jury to determine whether or not the company owed Sawitzke a duty to instruct him, and whether it failed in that behalf, and whether such failure to perform that duty was negligence which was the proximate cause of the injury, and we can not say as a matter of law that no duty existed or that a finding of such duty and failure of its performance is against the weight of the evidence.

The company also claims that while the statute of Ohio in general terms requires belt shifters, the evidence discloses that at the time of this injury no shifter of any kind was in use for the purpose of shifting belts on cone pulleys of the character in question, and that no shifter suitable for such purpose had then been devised which was practical, and that for that reason it was not negligence on the part of the company to not comply with the statute.

There was much testimony *pro* and *con* as to such shifters being practical and in use since the accident, and there was some testimony to the effect that they were in use before the accident.

The judge charged the jury:

“And if you find from the evidence that there was no shifter suitable for that purpose provided at that time then I say to you, the company was not guilty of negligence in not having the shifters.”

Without discussing the correctness of this instruction, we feel that the company was given the full benefit of their contention, and as there was another claim of negligence which might account for the verdict of the jury, we can not determine which way the jury found this question of fact, and consequently it is useless to consider or speculate as to whether such finding is or is not against the weight of the evidence.

We find no error in the record prejudicial to the plaintiff in error, and the judgment in case number 2316 is affirmed.

GRANT, J., and DUNLAP, J., concur in both cases.

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**DIVISION OF PROFITS ON THE PURCHASE AND SALE OF
BASE BALL STOCK.**

Court of Appeals for Hamilton County.

CHARLES SCHMALSTIG V. CHARLES P. TAFT.

Decided, February 6, 1919.

Agency—In the Handling of a Deal in Corporate Stock for Joint Account—Answer Construed not as a Confession and Avoidance—But as a General Denial, Amplified by Evidential Facts—Defenses—Burden of Proof.

Where the facts presented by the testimony on a given issue have been construed by the jury in favor of the plaintiff, an incorrect charge as to the burden of proof on that issue is not available to the plaintiff as a ground of error, inasmuch as it was without prejudicial effect.

Jacob Shroder and Benton S. Oppenheimer, for plaintiff in error.

Lawrence Maxwell, Worthington, Strong & Stettinius and *Robert A. Taft*, contra.

By THE COURT.

Plaintiff sued defendant for \$55,555.55 and interest, claimed to be due for money had and received by defendant for his benefit, being his portion, as the owner of 100 shares, of the proceeds of a sale of 900 shares of stock of The Chicago National League Baseball Club.

Defendant in his answer set forth in considerable detail a history of the purchase, ownership and sale of the stock and admitted that there was due from him to plaintiff the sum of \$6,255.54, with interest, but denied that plaintiff was entitled to recover any greater sum from him, and made a general denial.

This case has been tried twice to a jury, the evidence being substantially the same at each trial. The facts in the case are stated in the opinion of Judge May, reported in 19 N.P.(N.S.), 513, in which the verdict by three-fourths of the jury at the

first trial for \$58,703 was set aside and a new trial granted for the reason that the verdict was manifestly against the weight of the evidence, and for error in giving the special charge requested by plaintiff, which is set out on page 519 in said report, which placed the burden of proof on defendant to show that he bought the 530 shares of stock from Murphy as agent for plaintiff with others proportionately.

At the trial under review, three theories of the case were left open to the jury under the charge of the court, and three forms of verdict submitted.

(1) They might find for plaintiff in the full amount claimed by him on the theory that he would be entitled to one-ninth of the purchase price regardless of other considerations, in which finding the verdict would be for \$55,555.55, with interest.

(2) They might find that the 530 shares of stock were purchased by defendant as agent for plaintiff, together with the other two owners of stock acting with him, and that plaintiff was chargeable with his proportion of the losses and expenses incurred as to said Murphy shares, or so-called treasury stock, in which case the verdict would be for \$6,255.54, with interest, the amount defendant admitted to be due.

(3) Or they might find in accordance with the understanding or agreement that "fair treatment" shown to exist or be implied between the parties by their conversations and conduct on January 3, 4 and 5, 1916, when plaintiff might be entitled to his pro rate of 10-37 of \$50,000 cash left after the payment out of \$500,000 purchase money the balance due, \$450,000 on the original Murphy purchase. This amount according to the check offered plaintiff by defendant before the commencement of this suit would be \$13,513.50, with interest.

The verdict returned at the second trial was consistent only with the last above named theory, the amount being \$14,892.35.

A motion for a new trial was overruled, and judgment entered on the verdict, to which plaintiff prosecuted error.

The errors chiefly urged here on the part of plaintiff are in relation to the charge of the court. Judge May found that upon the first trial the court had been in error in placing the burden of proof upon defendant as to the question of agency or trustee-

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ship of defendant in the matter of the so-called Murphy shares. After a careful reading of his opinion and the authorities cited by him a majority of the court agree with his conclusions and consider the answer not as pleading a confession and avoidance, but as being in effect no more than a general denial, merely amplified with unnecessary relation of evidential facts.

If defendant sold plaintiff's stock under an express or implied agreement made on or about January 4, 1916, that fact could have been proved under a general denial, it would not have been an affirmative defense, nor would the burden of proof in respect thereto have been on the defendant.

In order to determine just what the defense made by the answer was, a minute examination of the entire document must be made. Under Section 11345 of the Code it is to be liberally construed. The difficulty is rather one of determining the intent of the pleader than one of principles of law involved. Undoubtedly defendant could have alleged that he had acquired rights that offset those of plaintiff. Such matters would constitute an affirmative defense. The answer might be construed as alleging that the defendant had bought 530 shares of stock from Murphy as agent for plaintiff and others; and held them as trustee for them; that the stock cost \$500,000; and that they were included as part of the 900 share lot sold with the consent of plaintiff; and that there was a loss in that part of the venture in which plaintiff must participate, and which should be deducted from plaintiff's share of the proceeds, if his 100 shares of stock had been treated as sold for \$55,555.55.

It might be noted that after the answer was filed, plaintiff moved to strike out the allegations of the answer relating to the Murphy deal, and the court in a written opinion then upheld what apparently was the claim of the plaintiff at that time that those matters constituted an equitable defense.

A proper construction of the pleadings is a question not without difficulties. According to the view which the trial court took, the defendant was attempting to state facts which would have constituted a defense without regard to the issue as to whether the stock was sold under the contract made January, 1916. One member of this court inclines to the view that the

transaction in regard to the Murphy stock was intended by the defendant to be set up as a defense independent of and in addition to the defense of the general denial. And that irrespective of the issues raised in the pleadings. If an issue is raised by the evidence properly offered in support of the respective claims of the parties, it is not improper for the trial court to charge the jury as to the law governing the situation thus developed. *Rayland Coal Co. v. McFadden*, 90 O. S., 183. And that the transaction in regard to the Murphy stock raised such an issue, the court charges:

"He (Taft) says he was acting as agent of the plaintiff, and that acting as agent he had the right and authority to first reimburse himself for any expenses incurred in making the Murphy purchase." * * *

The court continued, "he then sets up an additional defense to this action * * *." And thereupon, the court explained the claim in respect to the agreement of purchase of the Murphy stock. That as agent for plaintiff the defendant would have had the right to reimbursement for losses in the transaction, in which the plaintiff was principal, and that would have been true regardless of the agreement of January, 1916, for such a defense, however, could only be regarded as established if there was a preponderance of the evidence in its favor. And it is the view of such member of this court that when the court charged generally that the burden was upon the plaintiff, without explaining that the burden as to that specific issue of defense was upon the defendant, he committed error.

But whether any error was thus committed in that respect or not, the court are entirely in accord that such error, if any, is not prejudicial.

The verdict of the jury conclusively shows that they did not adopt either of the first two theories upon which the case was submitted to them, as stated before, and found that plaintiff was not entitled to recover the amount claimed by him, being one-ninth of the purchase price, regardless of other considerations. They also found against the claim of the defendant that he was holding the Murphy stock as trustee or agent for plaintiff

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and others, and plaintiff was chargeable for his pro rate of the losses thereunder, and was entitled to only \$6,255.54, with interest. And they must have found that the third theory of the case was the true and correct one, and that an implied agreement had been made between the parties by their conduct and conversations under which plaintiff was entitled to the amount found in their verdict, to-wit, \$14,892.35.

The jury must have been deemed to have adopted the third theory or view of the case. They construed the facts on the issue as to the agency in favor of the plaintiff. An incorrect charge as to the burden of proof on the issue therefore could not possibly have prejudiced plaintiff.

The rule as stated by the court in the case of *Butte & Boston Consol. Mining Co. v. Montana Ore Purchasing Co.*, 121 Fed., 524:

“A party in whose favor the jury has found an issue can not allege error in the court's charge as to the burden of proof on that issue.”

The clearest illustrations of the operation of this rule are in cases where there is a special finding in respect to certain facts. Elliott on Appellate Procedure, Section 624; *Ellis v. Hammond*, 157 Ind., 267-271; *Roush v. Roush*, 154 Ind., 562, 573; *Moore v. Lynn*, 79 Ind., 299.

The rule is not confined to such cases. *Keyser v. Railroad Co.*, 61 Iowa, 175; *Lathrop v. Railroad*, 69 Iowa, 105; 4 Corpus Juris, 1042.

Even if the burden was upon defendant as to the issue of agency in the Murphy deal, as the jury determined that in plaintiff's favor, he can not complain of erroneous instructions which only affect that issue.

Considering the general charge as an entirety, it fairly states the law and is free from error.

Nor was there any prejudicial error in the refusal to give plaintiff's special charges 3, 4 and 5. Each of these special charges related to the question of whether or not defendant was acting as trustee or agent of plaintiff, and we have seen that question has now lost its importance inasmuch as the jury on the

issue of agency found in favor of the plaintiff and against the defendant. These charges were also properly refused for the reasons given by Judge Geoghegan in his memorandum opinion in refusing the motion for a new trial.

While plaintiff and defendant did not fully accord in their respective versions of the conversations of January, 1916, that led to the placing of plaintiff's stock in defendant's hand for the consummation of the sale, the testimony of plaintiff himself does not bear out his claim, that it was then the agreement of the parties that he was to receive one-ninth of the entire sale price of the 900 shares. On the contrary, the verdict of the jury is fully sustained by the evidence. In view of the fact that the excerpts set forth in the published opinion of Judge May are substantially the same as the testimony at the second trial it is not necessary to set out the evidence here.

The judgment is therefore affirmed.

JONES, P. J., HAMILTON and SHOHL, JJ., concur.

**PRESUMPTION AS TO WHETHER A MISSING PERSON IS
LIVING OR DEAD.**

Court of Appeals for Franklin County.

JOHN S. YOUNG v. WHEELER J. YOUNG ET AL.

Decided, February 20, 1919.

Burden of Proof—Of the Death of One Mysteriously Missing—Rests for Seven Years on the Party Asserting Death—Presumption of Death then Arises.

Where a person mysteriously disappears and is not again heard from, a legal presumption of his death does not arise until seven years from the date of his disappearance, and in the absence of any proof showing his death the property of an ancestor dying within the seven year period will be presumed to have descended to such absent heir."

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M. E. Thrailkill and *John R. Horst*, attorneys for plaintiffs in error.

James A. Allen, attorney for James Ross and William R. Diehl.

Donaldson & Tussing, attorneys for the Sifrits.

Huggins, Pretzman & Davies, attorneys for Anna Young individually and as executrix.

KUNKLE, J.

This case comes into this court on error from the judgment of the court of common pleas.

In brief the facts disclosed by the record show that John S. Young Sr., late of this county, died intestate, March 4, 1900, owning 98 acres of land in this county; that he had two children, Edward W. and Wheeler J. Young; that Wheeler J. Young disappeared on December 31, 1899, and has not been seen nor heard from since the date of his disappearance; that Wheeler J. Young was sheriff of this county at the time of his disappearance and that his second term of office, as such sheriff, expired the day after his disappearance; that at the time of such disappearance Wheeler J. Young was a man of about fifty years of age and in apparently good health; that he made an assignment of all his property upon the day of his disappearance; that he was a man of striking appearance and had an unusually large circle of friends and acquaintances.

In view of the circumstances disclosed by the record it is claimed by counsel for plaintiff in error that Wheeler J. Young was either killed or committed suicide on December 31, 1899, the day of his disappearance.

It further appears from the record that Edward W. Young, the brother of Wheeler J. Young, died intestate, November 12, 1907, leaving the plaintiff in error, John S. Young, Jr., and Joseph Young, now deceased, as his only children and heirs at law.

Under this state of facts to whom does the 98-acre tract of land above referred to belong?

If Wheeler J. Young died on the day of his disappearance, then he can not be considered as an heir of his father, John S.

Young, Sr., as the father died after the date of such disappearance, namely, on March 4, 1900, and none of the defendants in error are entitled to an interest in this land through Wheeler J. Young, either as creditors or otherwise.

If Wheeler J. Young was living at the time of the death of his father, namely, on March 4, 1900, then certain of the defendants in error have an interest in said 98-acre tract of land.

If Wheeler J. Young died December 31, 1899, that being the date of his disappearance, or at any time prior to March 4, 1900, then the judgment which was recovered by William R. Diehl on April 6, 1900, was rendered against a dead man and is void.

If Wheeler J. Young died December 31, 1899, or at any time prior to the death of his father, then the judgment for alimony in favor of Mrs. Young which was recovered July 31 would be void for the same reason and the devise of same to her son, William R. Diehl, would be of no effect.

If Wheeler J. Young died December 31, 1899, or at any time prior to the death of his father, then he was not seized of any interest in his father's estate, and Edward W. Young was the sole heir of the father, John S. Young, Sr.

We have no doubt but that counsel have investigated every clew to determine whether Wheeler J. Young is dead or alive, but it is conceded that the record does not contain any facts which show whether Wheeler J. Young is actually dead or alive, or if dead, when he died.

Certain facts are disclosed by the record which tend to show that Wheeler J. Young had a motive for concealing his identity at the time of his disappearance, namely, financial and domestic troubles.

Upon the other hand, it is claimed that Wheeler J. Young was a man of such striking personality and had such a wide acquaintanceship that, if living, he could not have concealed his identity for this length of time had he desired to do so.

Any conclusion reached is mere conjecture, as the record does not contain any testimony which would justify the finding that Wheeler J. Young was either actually dead or alive on March 4, 1900, the date of the death of his father.

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This case must, therefore, be determined upon legal presumptions.

What is the legal presumption as to the date of the death of Wheeler J. Young?

Upon the one hand it is claimed that the legal presumption is that Wheeler J. Young died on the date of his disappearance, and that the burden rests upon defendants in error to show that he was living at the time of his father's death.

Upon the other hand it is claimed that such presumption does not arise until the expiration of seven years from the date of the disappearance of Wheeler J. Young; that the evidence shows he was alive and in apparently good health within about three months from the date of the death of his father, and that, under the pleadings and the law the burden rests upon plaintiff in error to prove that Wheeler J. Young was not living when his father died.

We have carefully considered the very helpful briefs which have been filed by counsel.

We shall not attempt to discuss these authorities in detail, but from a consideration of the same, we think the presumption is that Wheeler J. Young was living at the date of the death of his father.

In the 10th O. S. Reports, page 596, the first paragraph of the syllabus is as follows:

"When a man leaves his home or usual place of residence, and goes to parts unknown, and is not heard of or known to be living for the period of seven years, the legal presumption arises that he is dead."

In the 33d O. S. Reports, page 155, the first paragraph of the syllabus is as follows:

"If a husband leaves his family and usual place of residence, and goes to parts unknown or a distant state and is not heard of or known to be living for the period of seven years, the presumption arises that he is dead."

In Greenleaf on Evidence (15th Edition), Volume 1, page 62, the following rule is announced:

"Other presumptions are founded on the experienced continuance of permanency of longer and shorter duration in human affairs. When, therefore, the existence of a person, a personal relation, or a state of things, is once established by proof, the law presumes that the person, relation or state of things continues to exist as before, until the contrary is shown or until a different presumption is raised, from the nature of the subject in question.

"(a) Thus, where the issue is upon the life or death of a person, once shown to have been living, the burden of proof lies upon the party who asserts the death.

"(b) But after the lapse of seven years, without intelligence concerning the person, the presumption of life ceases, and the burden of proof is devolved on the other party."

Upon a consideration of the pleadings, the record and authorities cited, we are of opinion that the weight of authority and the better reasoning sustains the finding that a legal presumption of the death of Wheeler J. Young did not arise until the expiration of seven years from the date of his disappearance, and in the absence of any proof showing his death prior to March 4, 1900, Wheeler J. Young should be considered as an heir of his father, John S. Young, Sr., and entitled to a one-half interest in the 98-acre tract of land in question.

In reference to the claim that the court had no jurisdiction in the alimony proceedings of Anna Young, we are of opinion that under the decision of our Supreme Court in the case of *Benner v. Benner*, 63 O. S. Reports, 220, the court acquired jurisdiction to decree the property in question and that the proceedings in that case were regular.

We have also considered the objections urged against the Sifrit judgment and the other errors claimed by counsel for plaintiff in error, but finding no prejudicial error in the record, the judgment of the lower court will be affirmed.

ALLREAD and FERNEDING, JJ., concur.

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**PROPERTY INHERITED FROM RELICT REGARDLESS OF
PROVISIONS OF SEPARATION AGREEMENT.**

Court of Appeals of Richland County.

MAUDE M. MAY ET AL V. HENRY C. HESS ET AL.

Decided, October 7, 1918.

*Husband and Wife—Provision in Separation Agreement—Barring
Either of any Right of Inheritance from the Estate of the Other—
Not Effective, When—Descent of Non-Ancestral Property.*

An agreement of separation between husband and wife, which recites that "each party is by these presents hereby barred from any and all rights or claims by way of dower, inheritance, distribution," etc., from the estate of the other, does not bar either of said parties from inheriting from the other property which did not come by descent, devise or deed of gift, where the decedent died intestate and left no children or legal representatives.

Skiles, Skiles and Skiles, McClelland, Brucker, Vogele & Hinkle, and Mabey & Anderson, for plaintiffs, and all defendants and cross-petitioners, except Henry C. Hess.

J. B. Graham, Walter J. Sperry, and Reed & Beach, for Henry C. Hess.

HOUCK, J.

This case is here on appeal from a judgment entered in the common pleas court of Richland county. The agreed facts are:

That Mary A. Hess and Henry C. Hess were married January 9th, 1913; that Mary A. Hess departed this life, intestate, leaving no children or their legal representatives, on the 17th day of January, 1917, seized of the real estate described in the amended petition of plaintiffs, and which real estate is non-ancestral, except two cemetery lots located in the Belleville, Ohio, cemetery; that said non-ancestral real estate is of the value of not less than twenty-five thousand dollars; that Henry C. Hess and Mary A. Hess were husband and wife at the time of the death

of the said Mary A. Hess; that the following post-nuptial agreement was entered into between the said Henry C. Hess and Mary A. Hess:

“SEPARATION AGREEMENT.

“These articles of separation made and concluded at Mansfield, Ohio, this 5th day of November, 1913, by and between Henry C. Hess and Mary A. Hess, husband and wife, witnesseth:

“That whereas the parties hereto have agreed and hereby do agree to live separate and apart during the remainder of their natural lives: and

“Whereas said Mary A. Hess has this day paid to Henry C. Hess the sum of \$1.00 the receipt of which is hereby acknowledged and has this day signed a deed for said Henry C. Hess, thereby conveying to his daughter Rosa Burriss real estate known as part of lot No. 6 in Mt. Vernon, Ohio; now therefore with full knowledge of the rights and interest of the property of each other and of our own free will, and in consideration of the foregoing, each party hereto does hereby release and discharge the other from all obligations of support and from all other right, claims and duties arising or growing out of their marital relations; and said parties mutually agree that each party hereto may freely sell or otherwise dispose of his or her own property, by gift, deed or last will and testament, and each party is by these presents hereby barred from any and all rights or claims by way of dower, inheritance, descent distribution allowance for a year's support, and all other rights or claims whatsoever, in or to the estate of the other, whether real estate or personal, and whether now owned or hereafter to be acquired.

“And each party hereto for the consideration aforesaid, does hereby release and relinquish to the other, and to the heirs, executors, administrators and assigns of the other, all claim or right of dower and inheritance in and to all the real estate of the other whether now owned or hereafter acquired, all rights or claims to a distributive share of the personal property of the other, now owned or hereafter acquired, and all claim to year's support and all other claims whatsoever.

“Each party hereto further agrees, upon request of the other, to execute and acknowledge any and all deeds or other instruments of release or conveyance to enable such other to sell, convey or otherwise dispose of his or her own real property, free from any apparent right of inchoate dower therein.

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"In witness whereof the parties have hereunto set their hands on the day and date herein written.

"HENRY C. HESS,
"MARY A. HESS."

"Signed in presence of
"B. E. SAPP,
"HUGH NEAL."

But one question is here presented for determination, namely, under the facts and law is Henry C. Hess the owner in fee simple of the non-ancestral real estate described in the amended petition of plaintiffs?

It is claimed by counsel for Henry C. Hess that all non-ancestral real estate of which Mary A. Hess died seized passed to and the fee simple title vested in the said Henry C. Hess, as the surviving widower of Mary A. Hess, under and by virtue of the provisions of Section 8574, General Code, which reads:

"Section 8574. If the estate came not by descent, devise, or deed of gift, it shall descend and pass as follows:

1. To the children of the intestate and their legal representatives.

2. If there are no children, or their legal representatives, the estate shall pass to and be vested in the husband or wife, relict of such intestate.

3. If such intestate leaves no husband or wife, relict to himself or herself, the estate shall pass to the brothers and sisters of the intestate of the whole blood, and their legal representatives.

* * * * *

Counsel opposing Henry C. Hess urge that notwithstanding Mary A. Hess died intestate, without issue, and survived by her said husband Henry C. Hess, that he is barred from any interest in said real estate by reason of the terms and provisions contained in said post-nuptial agreement.

How stand the issues thus raised, under the conceded facts and the law applicable to them?

Under Section 7999, General Code, it is provided that a husband or wife may enter into any agreement or transaction with the other, or with any other person, which either might if unmarried, subject in transactions between themselves to the gen-

eral rules which control the actions of persons occupying confidential relations with each other. Therefore, it will be conceded that the parties to the contract under consideration had not only a moral but a legal right to enter into it.

It will further be conceded, under the facts, that unless Henry C. Hess has barred his right to inherit the real estate in question, by the provisions of said written contract, that he takes same under favor of said Section 8574, General Code. If Henry C. Hess has barred his right to inherit said real estate by said post-nuptial agreement, it is by reason of the following language used therein:

“And each party is by these presents hereby barred from any and all rights or claims by way of dower, *inheritance*, descent, distribution, allowance for year's support, and all other rights or claims whatsoever, in or to the estate of the other, whether real estate or personal, and whether now owned or hereafter to be acquired. And each party hereto for the consideration aforesaid does hereby release and relinquish to the other and to the heirs, executors, administrators and assigns of the other all claim or right of dower and *inheritance* in and to all the real estate of the other whether now owned or hereafter acquired...”

The language here used, as we construe it, in no way barred the right of the husband, if he survived his wife, to inherit her real estate; therefore it follows that it passes by operation of law.

It is clear to us that under the terms of the contract Mary A. Hess, during her lifetime could have sold and conveyed by deed this real estate, or she could have disposed of it by will, but she elected to do neither; and having died intestate, and leaving no children or their legal representatives, but a husband surviving, and being seized of real estate that came not by descent, devise, or deed of gift, it goes to and vests in said husband in fee simple.

Mary A. Hess had full power and dominion over the real estate owned by her, and had a legal right to alienate same by deed or will, but this she did not do. And having failed to designate who shall succeed her in title, our statute steps in and supplies the omission, and casts it, in this case, upon the surviving husband, Henry C. Hess.

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Counsel opposed to Henry C. Hess propound, in their written brief, the following question to the court:

"Now, shall it be said that after Henry C. Hess had procured Mary Ann Hess to relinquish her right in his property, and each of the parties lived under this contract the remainder of the life of Mary Ann Hess, that Henry C. Hess may treat this contract as a nullity, and reap the benefits under it?"

This is a proper and pertinent inquiry, and it seems to us that if correctly answered is decisive of the issues in the case. Our answer is:

Mary A. Hess was bound to know the law. She knew that she was the owner of the property now in controversy, and had a right to sell and dispose of it during her lifetime, yet she did not do so. She knew, and in law was bound to know that she could dispose of her property by will, but did not do so. It therefore follows, and the presumption of law is, that she intended the real estate in this lawsuit to go to and vest in the one designated by our statute to inherit same. True, Mary A. Hess might not have placed the proper interpretation or meaning upon the terms and conditions of the contract now before us, and might have been mistaken as to the legal effect of same, but this can in no way change the law of inheritance as fixed by legislative enactment.

Owing to the conclusion reached in this case, we deem it unnecessary to discuss the numerous claims made in the several answers and cross-petitions filed herein, other than the issues we have referred to as made by the amended petition and the answer of Henry C. Hess.

It must and does follow from what we have already said, that we find the issues in this case in favor of the defendant Henry C. Hess, and judgment is here entered finding that he is the fee simple owner of all the real estate described in the amended petition of plaintiffs, except the two cemetery lots located in the Belleville cemetery.

Judgment and decree accordingly.

POWELL, J., and SHIELDS, J., concur.

**PROSECUTION FOR KEEPING A PLACE WHERE INTOXICATING
LIQUORS ARE UNLAWFULLY SOLD.**

Court of Appeals for Williams County.

ERNEST P. MIGNERY V. THE STATE OF OHIO.

Decided November 5, 1917.

*Criminal Law—Irregularities in Issue of the Warrant of Arrest—
Waived by a Plea of Not Guilty—Complaint does not Lie to Failure
to Make Preliminary Examination, When—Evidence of a Single
Sale to a Minor Justifies a Conviction, When.*

1. In a criminal prosecution before a mayor, neither the omission of the mayor's official seal on the affidavit and warrant, nor the absence of a file mark thereon, nor the insertion of the original affidavit in the warrant instead of a copy or a statement of the substance thereof, affects the validity of the proceedings, and such irregularities are waived by a plea of not guilty.
2. A liquor licensee, prosecuted under Section 13195, G. C., for keeping a place where intoxicating liquors are unlawfully sold, can not complain that no preliminary examination has been had under 103 O. L., 239, Section 54, where he made no demand therefor, nor any claim of a previous conviction, nor that a conviction would operate to revoke his license, and where he went to trial on the merits before the magistrate without demanding a jury.
3. Proof that the defendant had given directions in good faith to his barkeepers not to make unlawful sales of intoxicating liquor is no defense in a prosecution under Section 13195, G. C., for keeping a place where intoxicating liquors are sold contrary to law.
4. Evidence of a single sale of intoxicating liquor to a minor, in a room equipped with bar fixtures and conducted as a saloon, justifies a conviction under Section 13195, G. C., for keeping a place where intoxicating liquors are unlawfully sold.

*John H. Schrider and F. S. & J. M. Ham, for plaintiff in error.
D. A. Webster, Prosecuting Attorney, contra.*

*Motion for leave to file a petition in error overruled by the Supreme Court, February 19, 1918.

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RICHARDS, J.

Heard on error.

Mignery was convicted before the mayor of the village of Stryker, in this county, of keeping a place where intoxicating liquors were unlawfully sold in violation of General Code, Section 13195, and was sentenced to pay a fine of \$500. The judgment was affirmed in the court of common pleas, and this proceeding in error is brought to reverse these judgments.

Very many reasons are urged why the judgments should be reversed. It is insisted that no affidavit was filed; that the paper which was filed as an affidavit is void for uncertainty and is not certified under the seal of the mayor; that no sufficient warrant was issued; that no preliminary inquiry was had pursuant to 103 O. L., 239, Section 54; that the court erred in the admission and rejection of evidence; and that the judgment of conviction is against the weight of the evidence.

An affidavit, which appears to be in due form of law, was made and filed with the mayor by W. M. Bonebrake, who made oath before the mayor that the statements contained in the affidavit were true. This original affidavit was pasted in a blank space in a warrant instead of writing into the blank space a copy of the affidavit or the substance thereof, and the warrant was thereupon signed and issued by the mayor. While it was somewhat irregular to use the original affidavit in this way, yet the validity of it was in nowise affected by such use; nor was the sufficiency of the warrant lessened by the fact that it contained the original affidavit instead of a copy thereof. The validity of the proceedings is not affected by the fact that the mayor omitted to attach his official seal to the affidavit or to the warrant. It was at most an irregularity which would not invalidate the proceedings. The state having done all that it was required to do by causing an affidavit in proper form to be made out and verified and filed with the mayor, it is not material that the affidavit does not bear a file-mark nor contain the official seal of the mayor of the municipality.

The defendant on being arraigned plead not guilty and on his application the hearing was continued to a later date. All

objections of the character mentioned are waived by the filing of a plea of not guilty. *Riflemaker v. State*, 25 O. S., 395.

When the case came on for hearing objections were made to the sufficiency of the affidavit and warrant and, on consideration, those objections were overruled. After the hearing had proceeded to the extent that the objections to the affidavit and warrant were overruled, a witness was called and the examination commenced, whereupon counsel for the defendant objected to further proceeding with the trial for the reason that no preliminary examination or investigation had been made as provided by 103 O. L., 239, Section 54. In order for a defendant to take advantage of the provisions of that section it is necessary for him to make due application to the magistrate for the preliminary hearing therein mentioned, and this application should be made before the parties have begun the trial of the case on its merits. In the case at bar the defendant made no application for a preliminary hearing under the section cited, but merely objected to proceeding to trial, and he failed to make even this objection until after the commencement of the trial upon its merits. While the defendant is the holder of a liquor license, nowhere does it appear in the record that he has been heretofore convicted of a previous offense under the liquor laws or ordinances; nor did he at any time make such contention; nor did he claim that a conviction in the pending case would work a revocation of the liquor license which had been granted to him by the state. The record does not disclose that the defendant at any time asked for a trial by jury. Under these circumstances the court committed no error in proceeding with the trial of the case upon its merits without theretofore having had the preliminary examination provided for in Section 54 above cited.

While the defendant was prosecuted in this case for keeping a place where intoxicating liquors were sold in violation of law, reliance was placed on certain sales to various minors claimed to have been made by bartenders in the defendant's employment. Three boys varying in ages from sixteen years and ten months to nineteen years testify to having bought liquors at various times

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of bartenders in the defendant's employment in a saloon which was kept and conducted by him. It appears from the evidence offered by the defendant that one of these boys was required to sign a written statement with reference to his age, and that thereupon he did sign one, not, however, writing his own name but writing the name Ralph Jones. This statement reads that the signer was twenty-one years old on the 15th day of March, 1893. Possibly the parties intended to set forth that the signer of the statement was born on the date given, but the writing does not so read and no explanation of the fact is made in the evidence. After these facts had appeared the defendant offered the writing in evidence and the court excluded the same. We see no prejudicial error in excluding this writing. Certainly the defendant could not be protected by a written statement so palpably false and signed under an assumed name.

Evidence was introduced on behalf of the defendant showing that he had on various occasions given his bartenders directions not to sell liquor to minors. If the prosecution were for unlawfully selling intoxicating liquor, it would be competent for the defendant to prove that he had given in good faith directions to his bartenders forbidding sales to minors as was held in *Ander-son v. State*, 22 O. S., 305. The charge in this case, however, was not that the defendant had unlawfully sold intoxicating liquor, but that he was the keeper of a place where intoxicating liquor was sold in violation of law, an entirely distinct offense. The General Assembly has by General Code, Section 13195, prohibited the keeping of a place where intoxicating liquors are sold, furnished or given away in violation of law, and in order to sustain a conviction under that act it is only necessary for the state to prove that the defendant is the keeper of the place and that intoxicating liquors have been unlawfully sold therein. In such a prosecution, order or directions given to the bartender are not material; nor is actual knowledge of the keeper of the premises that intoxicating liquors are unlawfully sold therein important. The question of agency of the bartender has nothing to do with a prosecution under this section. *State of Ohio v. Fuller*, 13 C.C.(N.S.), 405.

Some evidence was excluded tending to show that on particular occasions, other than those claimed by the state, the defendant, through his bartenders, refused to sell liquor to minors. The court committed no error in so holding for, as has been well said, evidence that one has violated the statute in one instance can not be rebutted by testimony that he did not violate it every time he had the opportunity. *State v. Lindner*, 76 O. S., 463.

As the statutes of Ohio now read, we have no hesitancy in reaching the conclusion that in a prosecution for keeping a place where intoxicating liquors are unlawfully sold, furnished or given away, proof of one unlawful sale in a room conducted as a saloon is sufficient to sustain a conviction. *Sanders v. State*, 1 Ohio App. Rep., 306; same case, 20 C.C.(N.S.), 395; *Lynch v. State*, 12 C.C.(N.S.), 330.

The evidence has at least the usual conflict found in cases of this character. The witnesses were before the mayor and he had better opportunity to judge of their truthfulness than this court. There was ample evidence introduced which, if believed by the lower court, would justify a finding that the defendant was guilty and, indeed, that sales had been made to minors on various occasions by persons in his employment. We have read all of this evidence and are not able to say that the judgment of conviction is so manifestly against the evidence as to justify a reversal.

Finding no prejudicial error, the judgment will be affirmed.

CHITTENDEN and KINKADE, JJ., concur.

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Hamilton County.

STREET CAR PASSENGER GIVEN WRONG TRANSFER.

Court of Appeals for Hamilton County.

DIEHL V. THE CINCINNATI TRACTION CO.

Decided, June 21, 1918.

Street Railways—Liability for Ejection of Passenger—To Whom a Wrong Transfer Had Been Issued—in Accepting Transfer Ordinary Care Required as to Its Correctness.

A passenger on a street car who has paid his fare and is entitled to ride over another line of the same company, and who having asked for a transfer over such line, is given, by mistake of the conductor, a transfer not properly punched as to time, may nevertheless, if he has exercised ordinary care and prudence about the receiving and making use of such transfer, lawfully insist upon being carried over such other line without further payment of fare; and if such passenger, without fault on his part, is ejected from a car for refusing to pay fare other than by such transfer, he may recover damages for the tort and can not be restricted to damages for breach of the contract to carry him.

Fulton & Woost, for plaintiff in error.

Joseph Wilby, contra.

GORMAN, J.

Error to the Court of Appeals of Hamilton County.

In the common pleas court plaintiff in error, George S. Diehl, sought to recover from defendant in error damages for an alleged wrongful ejection from one of the East End cars of the defendant in error. At the close of the plaintiff's evidence, the court, upon motion to instruct a verdict in favor of the defendant, granted the same, and judgment was entered in favor of the defendant upon the instructed verdict. This error proceeding is to reverse that judgment.

It appears in the record that on the morning of the 28th of June, 1912, plaintiff in error left his home on Hosea avenue

*For second opinion in this case, see *ante*, page 369.

about eight o'clock and boarded a south-bound Vine and Clifton car at the corner of Jefferson and Brookline avenues. He paid his cash fare of five cents and asked the conductor for a transfer to an East End car going east. The conductor received his money and gave him a transfer slip. The slip was punched for the East End car going east, but the punching was marked fifteen minutes later than the time at which it should have been properly punched. Plaintiff in error left the Vine and Clifton car at Fifth and Vine, hurried down Vine street to Fourth, one square boarded an East End car going east, and tendered his transfer to the conductor, who refused to receive the same because, as he stated, "the time of the punching was too late." He ejected plaintiff in error from the car upon his refusal to pay an additional fare, and put plaintiff in error as well as his suitcase or bag out upon the street. Plaintiff in error did not know that the transfer slip was punched at the wrong time, nor was there any evidence tending to show that he was in any wise negligent in accepting the transfer and in leaving the Vine and Clifton car and boarding the East End car, unless it may be that he was negligent in failing to notice the time punched on the transfer slip.

We are of the opinion that this was a proper case to submit to the jury on the question of whether or not the plaintiff in error was negligent in not discovering that the transfer slip had the wrong time punched on it.

The rule, in a case where the facts are similar to those above set out is stated in 1 *Nellis on Street Railways* (2 Ed.), Section 267. Among other things in this section it is stated:

"A rule with respect to the punching of transfers is reasonable, if due precaution be taken to insure its observance and application in such a manner as to protect a passenger from the errors or mistakes of the conductor. If the passenger, by reason of the inattention of the company's servants to its own rules regarding transfers, or to statutory requirement in that regard, is ejected, an action for the breach of the contract of transportation is not his only remedy. If it were, the carrier might be encouraged to employ negligent or incompetent conductors, to the serious annoyance and inconvenience of the trav-

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eling public, and passengers, would not be afforded reasonable protection or security in their rights. If a passenger entered the car believing his transfer was valid, and was not negligent in failing to discover that it had been punched erroneously, he was there lawfully, and is entitled to maintain an action for the wrongful ejection, and to receive compensating damages for the loss of time, fare on another car, and injury to his feelings because of the indignities suffered by him and his wrongful ejection from the car."

This doctrine appears to be supported by the case of *Cleveland City Ry. Co. v. Conner*, 74 Ohio St., 225, where it is stated in the first paragraph of the syllabus:

"A passenger on a street railway, who has paid fare and is entitled to ride over another line belonging to the same company, and who, having asked for a transfer ticket over such other line, is given, by mistake of the conductor, a transfer which is not good over such other line, may nevertheless, if he has exercised such care about the receiving and making use of the transfer ticket as persons of ordinary prudence are accustomed to exercise under the same or similar circumstances, lawfully insist upon being carried over such other line without further payment of fare; and if such passenger, without fault on his part, is ejected from a car for refusing to pay fare, other than by such transfer ticket, he may recover damages for the tort and can not be restricted to damages for breach of the contract to carry him."

A passenger upon paying his fare and receiving a transfer which he has requested, and which transfer the street railway company is obliged to give under the law and the provisions of its charter, has a right to assume that the servant of the street railway company will perform his duty in giving him a proper transfer properly punched as to time. 1 *Nellis on Street Railways* (2 Ed.), Section 273.

In the case of *Eddy v. Syracuse Rapid Transit Ry. Co.*, 50 App. Div. (N. Y.), 109, it was held:

"Where a passenger upon a street car receives from the conductor a transfer containing the following condition: 'Good only at transfer junction—on first connecting car, after time

canceled on the line punched, subject to the Rules of this Company,' and, without knowledge that the time at which the transfer had been issued was erroneously punched, and without being negligent in failing to discover that fact, boards the first car on which the transfer would have entitled him to ride, if it had been properly punched, his ejection from such car because of the conductor's refusal to honor the transfer, is wrongful and entitles him to recover from the railroad company compensatory damages for the indignity, humiliation and injury to his feelings caused by such wrongful ejection and the remarks of the conductor attending it."

In the case of *Memphis St. Ry. Co. v. Graves*, 110 Tenn., 232, it is held:

"It is negligence on the part of a street car company for a conductor to give a passenger a wrong transfer ticket, and the passenger can accept the transfer ticket without question, and his acceptance of such ticket will not constitute negligence on his part. The passenger will not be required to scrutinize the ticket, but he may assume that the conductor has given him the proper ticket; and if the conductor make a mistake, it is the fault of the company, for which it is liable."

It is further held in the second paragraph of the syllabus of this case:

"When a passenger on a street car pays his fare, and is, by the conductor thereon, given a transfer ticket, which the conductor on another car, to which the passenger properly changes, refuses to accept, and the passenger is forcibly expelled from the car, he can recover from the street car company all approximately resulting damages, including those for humiliation and mortification, if such were in fact sustained."

The amount of damages which the plaintiff in error might be entitled to recover would depend upon the circumstances of the case, but that question is not presented by the record in this case, because the jury had no opportunity to pass upon the question of damages, but were precluded from considering the case by the ruling of the trial court in arresting the case from their consideration.

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The judgment of the court of common pleas will be reversed and a new trial granted.

Judgment reversed, and new trial granted.

JONES, E. H., and JONES, OLIVER B., JJ., concur.

LIABILITY OF BROKER SELLING BY SAMPLE.

Court of Appeals for Hamilton County.

THE LIPPENCOTT COMPANY V. THE R. A. HOLDEN COMPANY.

Decided, January 24, 1916.

Sales—Dried Apples Sold by Sample—Afterward Condemned as Unfit for Food—Broker Handling Said Goods not Liable to Purchaser.

A broker who sells dried apples by sample, with opportunity to the purchaser to inspect them upon arrival, is not liable to the purchaser on account thereof, where it appears that the apples were accepted and paid for in due course, and a little later were condemned by a Federal inspector as unfit for food.

Bentley & Mente, for plaintiff in error.

Suire & Rieilly, contra.

JONES (OLIVER B.), J.

The question in this case is whether a broker, who sold dried apples by sample, is required to repay the purchase price to the purchaser, when the dried apples transported in interstate commerce were seized by the Federal government as being in violation of the Federal food and drug act, and were condemned and destroyed by virtue of proceedings under a libel filed in the United States District Court.

The record shows that the sale was made by sample; opportunity was given the purchaser to fully inspect the shipment when it arrived July 25, 1913. The goods were accepted and sent by the purchaser to cold storage, and paid for to the broker

July 28. Afterwards they were seized by the Federal inspector who first inspected them five days after their acceptance.

The proof fails to show that the goods were not up to sample, or that they were adulterated and unfit for food at the time of acceptance by the purchaser. It does not appear that the broker ever saw the goods, or that he was in any way responsible for the condition in which they were received, or that he made any representations whatever to the purchaser further than to exhibit to him the sample by which the sale was made and to notify him of the receipt of the goods in the railroad car.

No defense to the libel was made by the purchaser or by anyone in the proceedings in the Federal court. After the monition and attachment issued, notice by publication was made and mailed to the purchaser, the warehouseman, the broker, and the shipper. Final judgment was entered November 5, 1913, sustaining the allegations of the libel, and adjudging the dried apples under seizure adulterated, in violation of said food and drugs act, condemning them and ordering their destruction. A copy of these proceedings and judgment was relied upon by defendant as being conclusive proof of the unsalable condition of the goods when they were shipped and when they were accepted by the purchaser. This was an action *in rem*, and can only speak as to the condition of the goods at the time of the seizure. There is nothing in the record except possible inference to show their condition previous to that time, either at the time of sale or delivery.

A careful consideration of the record fails to disclose any error to the prejudice of the plaintiff in error and the judgment is therefore affirmed.

JONES (E. H.) P. J., and GORMAN, J., concur.

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Cuyahoga County.

**LIABILITY FOR THE DEATH OF ONE WHO WAS
HIMSELF NEGLIGENT.**

Court of Appeals for Cuyahoga County.

GEORGE K. BRIERLEY ET AL, D. B. A. THE BRIERLY MACHINE COMPANY, v. HENRY W. BURTON, ADMINISTRATOR.

Decided, January 13, 1919.

Application of the Doctrine of Discovered Peril—Duty of Averting an Accident to One in Danger Through his Own Negligence—Limitation on Liability Based on Failure to Make the Utmost Use of the Last Chance.

1. The humanitarian doctrine of last chance is not applicable in a case in which contributory negligence had first intervened, where the undisputed testimony tends strongly to show that the rescue of the decedent from his position of peril would have been physically impossible within the time and under the circumstances presented at the moment his position of danger was discovered.
2. Nor would the rule embodied in said doctrine be rendered applicable by adopting the view of an expert, called on behalf of the plaintiff, that a quick and active man might have effected a rescue, where the work was not of a character requiring a man of that type, and had such a man been on the job he could only have effected a rescue by determining what to do and going through several motions within the space of two seconds and at the risk of his own life or serious injury.

Edward Hobday, for plaintiffs in error.

Tolles, Hogsett, Ginn & Morley, contra.

GRANT, J.

Error to the court of common pleas.

The parties will be designated here as they were below.

Plaintiff's intestate came to his death as a result of being crushed in an elevator located on premises owned and controlled by the defendant company.

The trial was to a jury. There was a verdict for the plaintiff, upon which the judgment brought here for review was rendered, after a motion for a new trial had been overruled.

At the end of the plaintiff's case a motion was made by the defendant for a directed verdict in its favor, which was denied and an exception was taken. As this motion was not renewed at the end of all the testimony taken, the exception is not now in that particular form available to the complaining party.

In the view, however, that we have concluded to take of the case, the form of the objection to the judgment under review is not material. The substance of the complaint made to us here is that there is no evidence shown in the record that can be said to support the judgment, a question of course involved in the one raised by the overruled motion for a new trial.

The intestate at the time of his death was of full age. He was not then in the employ of the defendant, or engaged in its service in going into the elevator. He was not there upon any expressed invitation of the defendant. It is claimed in the brief for the defendant in error that there is evidence tending to show an implied invitation. But we do not regard that question, or any question as to the status of the decedent while on the elevator—whether as there by mere license or upon a supposed invitation—as material to the present consideration. It is allowed on all hands that if the plaintiff was entitled to recover at all in the action, it must be because his intestate came to his death while under the protection of the so-called rule of last chance, and by that rule his standing here is to be conclusively tested and ascertained.

The court below, upon the trial, limited the plaintiff's right of recovery, if he had any, to the sixth specification of negligence of his petition, which was pleaded as follows:

“Defendants failed and neglected to use reasonable care in stopping said elevator so maintained and operated as aforesaid, before decedent was killed thereon, after they saw decedent's position of danger, and in this respect defendants were guilty of gross and wilful negligence which operated proximately to cause decedent's death.”

This issue, thus formulated, manifestly called for the application of the rule mentioned and precluded the consideration of any other. The law in Ohio upon this recognized doctrine of liability

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is settled, and will be discussed later. Our present concern is to gather from the record just what the matter of fact in the case is, and from thence deduce a conclusion as to whether, under the doctrine, the plaintiff has brought his intestate within the sweep of its shield of protection.

The sum total of the facts—making up the single controlling and decisive fact upon which our judgment will depend—is not, as we regard the whole case, in dispute. Its constituent evidence, so far as this is material here, is as follows:

The elevator in question was a freight elevator. It was operated in part by manipulation and partly automatically. The operator in charge was an employee of the defendant company, Joseph by name.

On the day of his death the decedent came to the premises with some material sent by his employer to the defendant company, which he delivered by carrying it up to the third floor of the building, using the stairway for that purpose. He was there told that there were some other materials there, to be taken back to his master—these then being on the third floor. They were already loaded on a truck. Joseph, the defendant's elevator operator, was then told by one of his employers to take this truck load down on the elevator, which he proceeded to do by wheeling the truck to the shaft, lifted the gate and so manipulated the cable appliance as to bring the elevator platform up from the floor below. When it reached the third floor level Joseph did not stop it, although it seems he tried to do so, but the platform kept on ascending towards the fourth floor. When it had so passed up to a distance of about five inches above the third floor, the plaintiff's intestate, without invitation and unknown to Joseph, climbed upon the ascending platform. He at once attempted to get off—the elevator platform being still in motion—and while doing so was caught between the rising platform and the descending elevator gate and was thrown down the shaft and killed.

The elevator was so arranged that the platform stopped at the fourth floor automatically. But the deceased apparently did not know this, and becoming frightened as he kept on moving up-

ward, raised an outcry, whereupon Joseph called to him to stay on the platform, as it would shortly stop; this warning was several times repeated.

Notwithstanding it, the deceased, frantic with what seemed to him impending danger—for such unquestionably was his state of mind at that time—continued his efforts to climb off the elevator floor, until the gate—then released and beginning to descend—striking the back of his neck, scraped his body from its position over the edge of the platform and hurled him down the shaft to his death. This release of the gate and its beginning to come down took place when the platform or elevator floor had risen to twenty-one inches above the level of the third floor. The only way by which the ascent of the elevator could be stopped by manipulation was by the operator reaching around for a distance of nineteen inches and engaging a spring or dog which would have checked the upward movement of the platform, and there is evidence tending to show that Joseph attempted to do this as the elevator passed above the third floor without stopping, although it does not appear that this was in response to any cry of the deceased notifying Joseph of the state of peril he was in.

But, as we view the issue, this also is not material. Whatever attempt at stopping the elevator by the appliance named might have been made, it could not avail to save Burton for sheer want of time to make the effort available; the crash came simultaneously with making the attempt. Besides being altogether futile, the movement, carried any further, would have been at an extreme hazard of life or limb on the part of the manipulator.

According to the testimony of the experts, Mutton and Clark, offered by the plaintiff, and who were allowed over the objection of the defendant to testify as to certain experiments made by them with the same elevator after the accident, the following facts are established: The elevator opening above the third floor was substantially seven feet in height. The bottom of the gate was held, automatically, at about six feet above the level of the third floor, and as the elevator rose up the gate was released when the elevator platform reached a height of about twenty-one inches from the third floor level. The speed of the elevator was substantially sixty feet to the minute. The only way by which

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the elevator could be operated, or its progress arrested by any one outside of it, was by manipulation of the cable, and in the case in hand this could have been done only by the operator reaching beneath the floor of the car after it had passed far enough above the third floor level to enable him to interpose and perform the necessary manipulation. One of the experts says that this could be done by proper manipulation of the cable after the elevator car had passed a distance of three feet above the level of the third floor, but this is conditioned on the manipulator being an "active" man; in another place it would require a "quick active man" to do it, as he says. The other expert testifies that in an experiment made after the fact he stopped the elevator within a distance of four feet after it passed the third floor level, and that a man could not begin to reach under the elevator car to do the manipulating of the cable until it had reached a height of two feet and a half above the level of the third floor.

We assume the competency of this evidence, although under other circumstances we should regard it as of doubtful value in that respect. We make no present comment on the effect to be given to it, or as to the conclusions to be reached from it, leaving that consideration till we come to apply the law of the case to it and the other testimony disclosed by the record.

We have already characterized that law as belonging to the doctrine of the last clear chance. It is sometimes also called the law of discovered peril, and courts have referred to it as the humanitarian doctrine, as undoubtedly it in foundation is. For some time it went by the name of the rule of *Davies v. Mann*, from the case in which it seems first to have been struck out. 10 Mees and W., 546.

Nevertheless, it is a rule of law, measured by the rigidity of law, and not a varying or flexible consideration to be swayed by the appeals of sympathy or pity or helplessness in misfortune, however creditable these may be upon the humane side of mankind, operating outside of courts.

The doctrine, in its application, has been pushed far beyond its first intendment, so far indeed, that it has been used to make a railroad company responsible to the heirs of a suicide—a result

which has been characterized as abolishing the law of contributory negligence.

A halt, however, has been called on the extreme use, amounting to an abuse, to which this, in common with every beneficent rule, has been made subject, and in Ohio the application of the doctrine as one of "hit or miss," to be indiscriminately used, has been clearly denied.

Some attempt at definition of the rule may aid in applying it to the facts of this case. In *Quarterly Law Review*, Vol. 2, p. 507—cited with approval of *Vizerrachero v. Rhode Island Co.*, 26 R. I., 392—it is said:

"The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible."

In *Grand Trunk Rwy. Co. v. Ives*, 144 U. S., 408, the rule is thus formulated:

"Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury can not be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, subject to this qualification: That the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

For the purposes of the present case and in view of the point upon which our conclusion must rest, it will be sufficient to state the Ohio rule from the negative side. That is to say, to state what will relieve from the operation of the doctrine as applied to the facts, or what found facts will, as matter of law, defeat its application to, and control of them. It is to be found in the second syllabus of *Drown v. Traction Co.*, 76 O. S., 234, and is as follows:

"The doctrine of last chance' as formulated in *Railroad Company v. Kassen*, 49 O. S., 230, paragraph one of syllabus, does not apply where the plaintiff has been negligent, and his

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negligence continues, and concurrently with the negligence of defendant directly contributes to produce the injury; it applies only where there is negligence of the defendant subsequent to, and not contemporaneous with, negligence by the plaintiff so that the negligence of defendant is clearly the proximate cause of the injury and that of the plaintiff the remote cause."

And in the opinion, p. 248, the negative of the rule is amplified thus:

"Now it must be apparent upon even a slight analysis of this rule that it can be applied only in cases where the negligence of the defendant is proximate and that of the plaintiff remote; for if the plaintiff and defendant both be negligent and the negligence of both be concurrent and directly contributing to produce the accident then the case is one of contributory negligence pure and simple."

Now, let us apply the rationale of the doctrine as thus made manifest by our Supreme Court, to the undisputed facts, or to the most favorable view for the plaintiff that can be taken of them, as this record shows them to be. If his own witnesses are to be believed, it was about seven feet from the third floor to the top of the shaft. When the elevator platform was about 21 inches above the third floor the gate became disengaged and began to drop. The deceased was sitting—or we are assuming that he was sitting—on the edge of the platform floor, trying to get off. The descending gate struck him on the neck at not more than four and a half or perhaps five feet above the level of the third floor, when he was forced off and into the pit. The gate, therefore, travelled in the neighborhood of two feet in order to reach his neck. It dropped about 15 feet to the second. This would require less than a half second of time for the gate to come to the point of contact with Burton's neck. The ascent of the elevator platform was at a speed of about a foot per second, and as it had to travel only about two feet more upward, in order to have the iron fire door of the elevator intercept the view of Burton's body—this being about seven feet above the third floor level—it follows, demonstrably, that his body became wedged in between the falling gate and the edge of the rising

platform and he was in consequence forced off and down to his death, while the elevator car was traversing some part of the two feet still remaining. This was the distance within which only he could by the exertion of any possible diligence of effort, have been rescued from his peril, by any manipulation whatever of the appliance for that purpose at the time and place available. And the time within which alone the rescue could have been effected, was less than two seconds—because there was only that interval between the time when the intestate was seen trying to get off the platform and when he was thrown down the shaft and killed; all took place between the level of the third and fourth floors—it must have done so.

The decisive question then is, could Joseph, the operator of the elevator, within these limits of space and time, have discharged any duty he is shown to have known was owing by his master to the now dead man, to the effect of saving his life? We have no difficulty in finding that he could not. He could not have done so by not only the exercise of any reasonable care, but he could not have acted to that end effectually within the limits of a physical possibility. The deceased could not have been saved, within the time and under the undisputed circumstances of the case, by any manipulation of the elevator which Joseph could have put in operation.

Nor does the testimony of the experts enlarge the scope of the possibility of rescue to any practicable purpose, in our opinion, so far as the matters of fact testified to by them are concerned. Giving what they say its utmost weight, still, the conditions considered, the stooping posture into which Joseph must have gotten himself before he could even begin the work of rescue, the narrow space beneath the elevator floor within which he must have worked when he once was down and in a position to work at all, and the distance he must then reach out in order to manipulate the only appliances there were for stopping the elevator—taking all these things into the account, we say, and the plaintiff's contention of an unperformed duty owing by the defendant, is neither made out nor aided by the experts, granting the propriety of receiving what they had to say at all, and having regard to the time at which all that they testified took place.

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In respect to the opinion vouchsafed by them as to the time within which a rescue could have been effected, while we do not think that in that time even a physical possibility of saving of the man was shown, we do not, aside from that, regard the testimony as having any legal value. Its force is destroyed by the annexed condition that the rescuer must be an "active man," or a "quick active man," which condition was not allowable in this case. In other words, the hypothesis did not square with the requirement of the law.

The defendants were called upon to employ for their freight elevator service a man fit for *their* work in that respect, and not a Harvard graduate. They were not bound to furnish a man "quick" enough and "active" enough to insure getting a man out of trouble in their freight elevator, after he had by his own fault gotten himself in trouble, but only a man capable to operate the elevator in its ordinary and proper uses. We must reject this line of testimony altogether, not only for the reason we have now given, but also because the hypothesis takes no account of the rule of law that Joseph was under no obligation to act, if by acting he put his own safety in peril—which we think would have been the case here. The opinion also ignores the question of proof of the time when Joseph first knew of Burton's danger and the consequent necessity for his acting at all.

We consider that the testimony of these two men—Mutton and Clark—was all that in any view of the case could have sent it to the jury, or that could be used later to support the judgment. And we think it has no probative value.

The burden was on the plaintiff; it at no time shifted. Has it been borne? We think it has not.

The undisputed, mathematical evidence is to the effect that the elapsed time between the earliest moment when Joseph's attention could have been challenged to the impending peril of the plaintiff's intestate and when the latter was forced from the elevator's edge into the shaft and to his death, was insufficient and inappreciable to form a judgment of rescuing him and making it effective by any mode or manipulation within that interval either practicable or possible. The entire transaction,

both as to the negligence of Burton in putting himself in a place of peril and any possible call of duty which could have been imputed to Joseph, and through him to his master, the defendant, was simultaneous, and not a separable transaction. If there was negligence on both sides—on the one side apparent and admitted, or at least proved beyond dispute—and on the other sought to be imputed—it was a concurrent, abiding and continuing negligence. There was no interval of time or circumstance, at which a jury could properly interpose a bar of separation between where the negligence of one party ended and that of the other could have begun. At most—if indeed so much—the two negligences—if two there were, which we think is not proved or properly to be imputed—shaded into each other so imperceptibly as to result in a twilight zone, covering both alike with its mantle of legal consequence. Such negligence—admitting its dual character—is not to be, can not be, apportioned by a jury, or an attempted partition of it allowed to stand by a reviewing court.

In *Anderson v. Mo. Pac. Rwy. Co. et al*, 145 N. W., 843, the Supreme Court of Nebraska says:

“The doctrine of the last clear chance has no application to the case where a section foreman in a railroad company’s yards suddenly goes upon the track in front of a moving train of cars, at a point so near the engine that it was impossible to stop and avoid injuring him.”

We think this case is *that* case—exactly, in that it involves, as the determining consideration, the impossibility of avoiding injury to one in the first instance himself negligent, and that in this view—the impossibility appearing clearly, no room is left for the application of the only rule of law upon a recovery is, or indeed can be, claimed.

We find and hold that upon the undisputed testimony this case is within the rule which by *Drown v. Traction Co.*, *supra*, denies a recovery to the injured party or his representative—in this case, the plaintiff below. It follows that the court below should have sustained the motion for a new trial. It was error to refuse it, as was done.

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For that reason, the judgment complained of is reversed.

As this determination proceeds upon the footing that the material facts in the record are not in dispute, in regard to which diverse conclusions could not have been reached by different persons, and that the question remaining is one of law only, our opinion is that final judgment for the plaintiff in error should be entered by this court, which is accordingly done.

We have been materially aided in our examination of this matter by the thoroughgoing briefs of counsel which have most industriously brought before us both the facts of the record and the law of the case.

DUNLAP, J., and WASHBURN, J., concur.

ACTIONS FOR DIVORCE AND ALIMONY.

Error to the Court of Appeals for Wood County.

SHAW V. SHAW.

Decided, October 27, 1917.

Divorce and Alimony—Failure of Jurisdiction as to Divorce—Not a Bar to Action Continuing for Alimony.

It is error to sustain a general demurrer to a petition praying for a divorce and alimony, where the petition sets forth facts constituting a good cause of action for alimony alone, although it is fatally defective as one for divorce in that it appears from the allegations of the petition that the plaintiff had not been a resident of the state for the full period of one year before filing her petition.

B. F. James, for plaintiff in error.

Edward Beverstock, for defendant in error.

RICHARDS, J.

Error to the Court of Appeals for Wood County.

The plaintiff, Jeanette E. Shaw, commenced an action in the court of common pleas against Frederick A. Shaw, praying for a divorce and alimony, making The Wood County Savings Bank Company and The H. J. Heinz Company, defendants, and asking an injunction against them. This petition was met by a demurrer based on the grounds that the court had no jurisdiction of the subject-matter and that the petition did not state facts sufficient to constitute a cause of action. The common pleas court, on consideration, sustained this demurrer and dismissed the plaintiff's petition, to which action of the court this proceeding in error is brought.

The judgment rendered in the court of common pleas is evidently based on the contention that the action is not one for alimony alone and that it appears from the petition that the plaintiff at the time of filing the same had not been a resident of the State of Ohio for the period of one year before the filing thereof.

The pertinent provisions of General Code, Section 11980, as amended 106 O. L., 339, which control the question are as follows:

"Except in an action for alimony alone, the plaintiff must have been a resident of the state at least one year before filing the petition. Actions for divorce or for alimony shall be brought in the county of which the plaintiff is and has been for at least thirty days immediately preceding the filing of the petition, a *bona fide* resident or in the county where the cause of action arose."

It appears from the petition in this case that the plaintiff had been at the time of filing her petition a resident of Wood County for more than thirty days immediately preceding the filing of the petition, and that the cause of action arose therein, but it also appears that she had not been a resident of the state of Ohio for one year before the filing of such petition. An examination of the petition discloses that it contains no averments other than

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those which are appropriate to set forth a cause of action for alimony alone, but that in the prayer the plaintiff asks for alimony an injunction and a divorce.

It is perfectly manifest that the petition is wholly insufficient as one for divorce for the reason that it appears therein that the plaintiff had not been a resident of the state for the period named in the statute as a pre-requisite to the right of filing such a petition. If we are to read and give due weight to every allegation in the petition, and also to the language of the prayer, there is but one cause of action set forth, to-wit, that for alimony. If we are to treat the prayer for divorce as mere surplusage there still remains a good petition for alimony and a petition containing no averment inappropriate therefor.

A general demurrer to a petition should not be sustained because the prayer of the petition is broader than is justified by the law or warranted by the facts pleaded. In any aspect the petition must in law be regarded as one for alimony alone, the prayer for injunction being a mere incident thereto.

It follows that the judgment rendered in the court of common pleas must be reversed and the cause remanded with directions to overrule the demurrer to the petition.

CHITTENDEN and KINKADE, JJ., concur.

CHILD STRUCK BY AUTOMOBILE.

Court of Appeals for Franklin County.

EDWIN O. DECKER v. DORIS A. MITCHELL By JOHN MITCHELL
HER NEXT FRIEND.

Decided, February, 1919.

*Negligence—Child Struck by Car Mid-way Between Street Crossings—
In the Absence of an Ordinance to the Contrary Pedestrian May Use
the Street at Other Points than Crossings—Relative Negligence of
Car Driver and Victim a Question for the Jury.*

1. For a pedestrian to attempt to cross the street at a point other than where there is a regular crossing for pedestrians is not negligence as a matter of law in the absence of an ordinance forbidding such use of the streets.
2. Whether reasonable care was used by a child ten years of age who was struck by an automobile while attempting to cross a street mid-way between crossings is a question for the jury, depending somewhat on the age, intelligence and experience of the one so injured.
3. While the driver of an automobile is bound to use special caution at street crossings to avoid striking pedestrians, he is bound at all times to keep within the speed limits and to use due care to prevent striking persons who may be in the street.
4. To admit testimony to the effect that school children were in the habit of taking a short cut across the street at the point where the accident complained of occurred is not prejudicial to one whose machine struck a child at that point, where the jury are charged that such testimony was without effect upon him unless the practice of children so to do had been brought to his knowledge.

Clayton A. McCleary, attorney for plaintiff in error.
Taylor, Williams, Cole & Harvey, contra.

FERNEDING, J.

The original action in the court of common pleas was brought by Doris A. Mitchell by her next friend against Edwin O. Decker for injuries received in an automobile accident which occurred

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in East Eleventh avenue near the Ohio State Fair Grounds in the city of Columbus. The defendant was the owner of the automobile in which he was riding at the time of the accident. The car was being driven by the defendant's son. The plaintiff at the time of the accident was between ten and eleven years of age. She approached Eleventh avenue, across vacant lots, and attempted to pass into Eleventh avenue at about the middle of the block and immediately in the rear of the street car. After passing the street car and reaching a point some ten or twelve feet from the south rail of the north track she was struck by the defendant's car and seriously injured. The negligence assigned in the petition was that the automobile was being operated at an excessive and unlawful rate of speed and that the driver of said automobile failed to use ordinary care to avoid the collision. It was claimed by the defendant that the plaintiff was negligent in attempting to cross the street at that particular place, it not being a regular street crossing; also that said plaintiff did not use proper caution to avoid the injury. There was a conflict of evidence as to the negligence of the defendant and as to the contributory negligence of the plaintiff. While the evidence on these subjects was conflicting we think these questions were properly submitted to the jury.

Counsel for plaintiff in error contend as a matter of law that the plaintiff below was guilty of contributory negligence because she undertook to cross Eleventh avenue at a point other than where there was a regular crossing for pedestrians. It does not appear that there was any traffic ordinance making it unlawful for pedestrians to cross a street in this section of Columbus at a point other than at regular crossings; consequently plaintiff was not guilty of any illegal act or chargeable with negligence *per se*. It therefore, became a question of reasonable care. This depended to some extent upon the age, intelligence and experience of the plaintiff and was a question for the consideration of the jury, *Mill Co. v. Corrigan*, 46 O. S. 283, *Railway Co. v. McKay*, 53 O. S. 370; *Railway Co. v. Wright*, 54 O. S. 101. The plaintiff, because of her tender years, is not chargeable with that same standard of care and caution as would be expected of a

person of mature years. Many of the cases cited by counsel for plaintiff in error, therefore, are not applicable.

It is also contended that the driver of defendant's car was not bound to contemplate that a pedestrian would be crossing a street between regular crossings and was therefore not bound to be on the lookout for such pedestrians. We think, however, that while the driver of an automobile would naturally be required to exercise a greater degree of caution at a regular crossing than at points between crossings, nevertheless it at all times became the duty of such driver to keep the speed of his car between crossings within the legal limit and to use due care and caution to discover pedestrians, particularly children, who may be found using the street. This is a question of fact to be determined from all the evidence and circumstances of the case. There was evidence tending to prove the custom on the part of children and others in that neighborhood to cut across lots and over Eleventh avenue at the point of the accident. The trial court distinctly stated that this evidence would not affect the defendant unless it was shown that he had notice, and we think that the introduction of such evidence under the circumstances was not prejudicial.

The jury returned a verdict in favor of the plaintiff in the sum of \$4,500; this the trial court reduced to \$2,900. We are not prepared to find from the record that the verdict was the result of passion and prejudice on the part of the jury, nor do we find that the verdict as reduced by the trial court is excessive. Finding no prejudicial error the judgment will be affirmed.

KUNKLE, and ALLREAD, JJ., concur.

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**LIABILITY OF ENDORSER ON NOTE PAYABLE IN
INSTALLMENTS.**

Court of Appeals for Cuyahoga County.

(Middleton, Walters and Sayre, JJ., of the fourth district,
sitting by designation in the places of Grant, Dunlap
and Lawrence, JJ., of the eighth district).

THE ELWORTHY-HELWICK COMPANY V. CHARLES N. HESS, AS
EXECUTOR AND TRUSTEE OF WILLIAM G. AMOR, DECEASED.

Decided, May 17, 1918.

*Promissory Notes—Rights of an Endorser—Where Note is Made Pay-
able in Installments—Effect of Failure to Give Notice as Each In-
stallment Becomes Due.*

1. When a promissory note is made payable in installments, the promise to pay each installment is a separate note in itself.
2. Under favor of Section 8194, General Code, an endorser of a note payable in installments is entitled to notice of the non-payment of each installment, and if such notice is not given he is discharged from all liability in respect to such installment.

Messrs. White, Brewer & Curtis, for plaintiff in error.

Messrs. Hoyt, Dustin, Kelcy, McKeehan and Andrews, for defendant in error.

MIDDLETON, J.

The parties stood in reverse order in the court below and for convenience we will refer to them here in that order.

The plaintiff filed his suit as executor and trustee of the last will and testament of William G. Amor, deceased, against one Holberger and his wife as makers, and the Elworthy-Helwick Company as endorser, of a certain note for the sum of \$1,600, dated at Cleveland, Ohio, April 8, 1912 with interest at the rate of six per cent. payable semi-annually on the 15th day of June and December of each year. Said note provided that the makers thereof should pay a sum of not less than twenty dollars each and

every calendar month from and after date until the principal and the interest of the obligation were fully paid. It was further provided that if the makers of said note should fail to make any two of said monthly payments when due the whole amount or balance due on said note should become due and payable at the option of the holder thereof.

The petition contained two causes of action, one in the usual form on a promissory note, by which plaintiff claimed judgment against the makers and against the Elworthy-Helwick Company as endorser; and in the second cause of action the plaintiff sought to foreclose a mortgage given as security for the payment of said promissory note.

To the petition of the plaintiff the Elworthy-Helwick Company filed an answer containing two defenses, which are substantially as follows: First, that the Holbergers failed to make the monthly payments called for in the note from the month of June, 1912, to the 11th day of September, 1914, except a payment of one hundred dollars in December, 1912, and a payment of thirty dollars in July, 1914; and that the plaintiff failed to present the note for payment as the other installments came due, and failed to notify said the Elworthy-Helwick Company, the endorser, of the dishonor of said installments as they fell due until about the 11th day of September, 1914, for which reason the said endorser claimed it is not liable for any of the unpaid installments which fell due prior to said September 11, 1914, and alleging that if it is liable for anything it is only liable for the sum of the installments falling due after said date. This is termed a "partial defense." The second defense is that the plaintiff failed to exercise his option to declare due the balance remaining unpaid on said note until long after two monthly installments were due and unpaid, and for an unreasonable period, during which time the premises described in the mortgage were vacant and were depreciating in value, thus impairing the security and thereby discharging the endorser.

The plaintiff filed a general demurrer to both defenses, which was sustained, and the defendant endorser not desiring to plead further judgment was rendered against it as such endorser for

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the sum of \$1,939.25, being the full amount of the unpaid balance on said note, including the unpaid installments falling due before September 11, 1914. Error is now prosecuted in this court to reverse said judgment on the ground that the court erred in sustaining said demurrer.

The chief contention, however, now made by the defendant endorser is as to the sufficiency of its first or partial defense. This defense presents the question as to when a note is dishonored which contains a provision for payment by installments, with a further condition that upon the failure to pay two or more installments the whole unpaid balance due on said note shall become due and payable at the option of the holder.

It seems to be conceded by both parties that when a note is dishonored by non-payment, notice thereof is necessary to hold the endorser. It is contended by the plaintiff that the note in question must be regarded as an entirety, and that as an instrument for the payment of money it did not become due and payable until the holder exercised his option to declare it due and made presentment and demand for payment. Upon the other hand, the defendant company urges that the obligation to pay the installments named in said note amounted in law to a separate and independent promise to pay each of said installments when the same became due by the terms of the instrument, and that upon non-payment of any installment when so due the note as to that particular installment was dishonored and notice of non-payment was necessary to hold it liable for that particular installment.

Attention is directed by both plaintiff and defendant to the provisions of Section 8194, G. C., being Section 89 of the Negotiable instrument act, which provides as follows:

"Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser. Any drawer or indorser to whom such notice is not given is discharged."

This section appears to be the only provision that may be found in the negotiable instrument act reflecting in any way on

the question at issue. It must be conceded that this section does not expressly cover a situation like the one under consideration. It does, however, by positive terms, require notice to all drawers or endorsers of the dishonor of the instrument by non-payment or non-acceptance in order to hold them liable thereon. The necessity of notice, therefore, obtains in all cases save those named in the exceptions, which exceptions have no application to the instant case. This being so, we are unable to conceive of any substantial reason why such notice of dishonor is not required as to each installment provided for in the instrument under consideration when such installment became due and was not paid. This instrument is the equivalent in law to a number of separate and independent instruments, each conditioned for the payment of twenty dollars at the times named. When, therefore, an installment became due and was not paid, the note to the extent of such installment became and was dishonored by nonpayment. No subsequent act of the holder in the exercise of his option could add in any degree whatever to the liability of the maker in respect to the payment of that particular installment. It was due and payable, and an action would lie for its collection by the holder regardless and independent of the exercise by him of the option to declare the whole unpaid balance due. The instrument having definitely and unconditionally provided for the payment of twenty dollars each and every calendar month after its date, the non-payment thereof in any month was a dishonor of the instrument to the extent of such amount, and thereafter the instrument as to such installment was overdue and unpaid. The argument advanced that more than one hundred such payments are required to fully discharge this note, and therefore an equal number of notices would be required in case of non-payment, can not affect the principle of law involved. If notice was necessary to charge an endorser in the event of non-payment in a case in which the aggregate amount was fifty thousand dollars, payable in installments of ten thousand dollars each, it is necessary in the instant case.

We do not question the soundness of the argument that if notice is not required by the provisions of Section 8194, *supra*,

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we may not refer to the common law for authority. Under the common law, however, it seems to be well settled that notice is required as to each default in the payment of any installment. It is said in *Daniel on Negotiable Instruments*, Section 599:

“If a note be payable in installments the presentment should be made on each consecutive installment as it falls due, as if there were (as in fact it is legally considered) a separate note in itself.”

In 7 *Cyc.*, page 96, it is said:

“If commercial paper is payable in installments, demand of each installment must be made to preserve the liability of the endorser.”

Many other authorities might be cited in support of the common law rule but, as before observed, they may not be considered here for it is now definitely settled that the negotiable instrument act in this state is exclusive as to all matters actually provided for therein. (*Banking Co. v. Walker-Bin Co.*, 92 O. S., 406).

It would seem that the question presented here would be one of frequent occurrence, but we have not been cited to a case in which it appears to have been presented, nor have we been able by our own investigations to find any adjudication of the precise question here under consideration. In the case of *Hopkins v. Merrill*, 69 Conn., 626, an action was brought against the endorser of a promissory note, payable in monthly installments, to recover the amount due on three of such installments, due notice of the non-payment of which had been given to the endorser. The court ruled that a failure of the plaintiff to notify the endorser of the non-payment of other installments did not affect her right to recover the three installments which were the subjects of the suit. While the court does not in terms say so, it may be inferred from its discussion of the question that if suit had been brought upon installments past due, of the non-payment of which notice had not been given, judgment would have been for the endorser upon such installments. While in this case the note

did not contain an option enabling the holder to declare the whole sum due for the non-payment of an installment or installments, that difference can not affect the principle involved.

We conclude, therefore, that under favor of said Section 8194, *supra*, the defendant endorser in the instant case was entitled to notice of the non-payment of the installments falling due between the dates named in its answer, and that by reason of the failure of the plaintiff to give such notice the defendant company endorser is discharged from any liability as to such installments.

We affirm the judgment of the lower court in its ruling on the demurrer to the second defense. (Section 8225, General Code.)

Judgment reversed and cause remanded for further proceedings according to law.

WALTERS, J., and SAYRE, J., concur.

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Pickaway County.

**CONSTRUCTION OF WILL WITH REFERENCE TO DISPOSITION
OF LAPSED ESTATE.**

Court of Appeals for Pickaway County.

GEORGE M. LEOPOLD, EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOHN SHOCK, ETC., v. ELIZABETH SHOCK WEAVER ET AL; ON APPEAL; AND ELIZABETH SHOCK WEAVER ET AL v. GEORGE M. LEOPOLD, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOHN SHOCK, ETC.; ON ERROR.

Decided, December 6, 1918.

Wills—Devise in Full of all Interest Does Not Bar Participation in a Lapsed Estate.

1. A devise in a will to a daughter "to be her full share and interest in all my estate" does not bar such devisee from her share of property not disposed of by the will.
2. This construction is not affected by the fact that the property in controversy had been disposed of by a legacy which had lapsed by reason of the death of the legatee in the lifetime of the testator.

*D. W. & A. S. Iddings and George M. Leopold, for plaintiff.
Munger & Kennedy, for Flora Shock Hern.*

ALLREAD, J.

This action was brought to obtain a construction of the will of John Shock. The material parts of the will are as follows:

"Item 1. I hereby devise and bequeath unto my beloved wife, Amanda Shock, all the real estate of which I may die seized to be hers for and during her natural life, and at her death, I desire that my executor hereinafter named shall proceed to sell my said real estate under the order of the Probate Court, legally obtained, and that he divide the proceeds of such sale equally among the following named persons to-wit: Elizabeth Shock Weaver, Frank Shock, Harvey Shock and Wilbert Shock—they being my children—all my children except Flora Shock Hern, and I desire that my said children above named and to whom I have given the proceeds of my said real

estate as set forth above shall give to my said daughter, Flora Shock Hern, the sum of One Hundred Dollars, the same to be her full share and interest in all my estate.

"Item 2. I give and bequeath unto my said wife all my personal estate to be hers absolutely. And it is my further will that, should my personal estate and the income from said realty be not sufficient to keep my said wife after my decease, in a comfortable manner, then that my said real estate may be sold in whole or in part as my said executor may deem advisable, and the proceeds from such sale be turned over to my said wife as she may need it for her comfortable support."

After the execution of the will and before the death of the testator, the wife of the testator died and the legacy provided for her benefit in Item 2 of the will lapsed. The chief question arises as to the disposition of the personalty. It is contended on behalf of the executor and the heirs exclusive of Flora Shock Hern that the personalty as well as the realty was intended by the will to go to the children exclusive of Flora Shock Hern; and that Flora Shock Hern was to be disinherited as to all of the estate of the testator except the \$100 mentioned.

Counsel representing each side of the controversy have presented unusually exhaustive and able briefs. We have also been furnished with a copy of the opinions of the trial court which contains a careful and fair analysis of the case at bar and a full review of the authorities from our own as well as other jurisdictions.

We think that by an almost unbroken line of decisions beginning in the common law and recognized and followed in most of the states including our own it is established that property undisposed of by a testator descends to the heirs and distributees under the statute of descents and distribution, and the right of an heir to inherit property not disposed of by the will is not affected by a clause in the will attempting to disinherit him. This doctrine was established in the case of *Crane v. Doty*, 1 O. S., 279, in which the following syllabi are announced:

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"A testator can not, by any words of exclusion used in his will, disinherit one of his lawful heirs, in respect to property not disposed of by his will.

"Such words can not be used to control the course of descent, so as to carry the property to his other heirs.

"They can not be used to raise an estate by implication in favor of his other heirs; there being no attempt in the will to dispose of the property or to create any interest therein."

The opinion in this case was written by Judge Ranney and contains a full review of the authorities in England and this country.

It was there contended as it is in the case at bar that the English doctrine is contrary to the reason and spirit of our own laws and rules of inheritance. This argument was overruled by Judge Ranney and the English doctrine approved. We think the doctrine of the *Crane v. Doty* case is too firmly established in this state to permit its being questioned. See *Mathews v. Krisher*, 59 O. S., 574.

It is argued that the *Crane v. Doty* case does not apply to the case at bar, for the reason that in that case the property which the heirs took was not mentioned in the will while in the case at bar the testator made a disposition of all his property including the property in controversy, and that upon the face of the will the intention would appear to exclude the heir in disfavor from any share in the whole estate.

We think, however, that the same rule applies to the property which becomes undisposed of property by the lapsing of a legacy as in the case of property not mentioned in the will. The testator is presumed to anticipate that a legatee may die during his lifetime and that the legacy may lapse, and if the testator does not provide for that contingency in the will the property would be undisposed of and would descend according to the statute. *Gorgas Estate*, 166 Penn St., 269; *Gallaher v. Crooks*, 132 N. Y., 338; *Tea v. Millan*, 257 Ill., 624; 40 Cyc., 1943.

Counsel cite the case of *Moon v. Stewart*, 87 O. S., 549, as starting a new doctrine and a modification of *Crane v. Doty*.

It is true that *Crane v. Doty* was distinguished, but we find no criticism or modification of the doctrine of *Crane v. Doty*. The *Moon v. Stewart* case invoked a will the terms of which were crude, yet it was held to be dispositive and all parties took under the will. There was no undisposed of estate.

It is contended that the special devise to Flora Shock Hern was expressed by the will "to be her full share and interest in all my estate." Particular emphasis is placed upon the word "all." But it will be observed that there is no residuary or other devise to carry the personalty to the four children; it would therefore follow that the testator in the contingency of the death of his wife left the estate to descend as intestate property.

Had the wife survived the husband, the four favored children would have taken nothing from the personalty. The personalty would in that event have been taken absolutely by the wife, and the portion unconsumed by her would have been subject to her disposition or pass by the statute of descent and distribution to her heirs or next of kin.

The four children of the testator can not claim the personalty under a dispositive term of the will. They can only claim under the statutes of descent and distribution. In doing so they invoke relief under a statute which confers title equally upon all the children. The children can not invoke the statute of descent and distribution so far as it favors them and deny the title in favor of Flora Shock Hern conferred by the same statute. Judge Ranney in *Crane v. Doty* says:

"The property must be disposed of upon the death of the owner. It may be disposed of by will; but if it is not, the law disposes of it to all the children alike. All dominion of the owner over it ceases with his life. To allow a testator to leave his property undisposed of, and by will to control the course of descent and distribution, would be to allow him to repeal the law of the land. It must go by devise or descent; and it is impossible to conceive of an estate created by a mixture of the two."

The claim that there is a devise by implication in favor of

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the four children to the exclusion of the fifth in the case at bar is also met by the opinion of Judge Ranney in *Crane v. Doty*.

It is also contended the construction that the property involved in the lapsed legacy should go to all heirs should apply only to the personalty existing at the time of the execution of the will and not to real estate subsequently converted.

It appears that Mr. Leopold prepared the will of the testator on April 7th, 1911. He testifies that he drew the will and the three affidavits found in the record and that John Shock made oath to his affidavit before him—the affidavit of John Shock being dated April 7th. It appears that on April 8th John Shock and his wife executed a deed to John H. Shock for the 26 acre tract of land before A. W. Somers, J. P., and that John H. Shock and wife executed notes and mortgage for unpaid purchase money. John H. Shock testifies that he agreed to pay \$4,000 for the tract of land, that he paid \$1,000 cash, gave notes and mortgage for \$2,000 and gave an unsecured note for \$1,000. The deed was filed with the recorder on April 18th at 10:35 A. M. We think the evidence establishes the inference that the deed must have been taken on April 8th.

The will although drawn on April 7th was not executed until April 18th. Whatever might have been the intention of the testator on April 7th, the time the will was drawn, his ultimate intention must be ascertained when he signed and executed the will on April 18th. At that time his personalty had been augmented by the conversion of the 26 acre tract of land into money and notes. The testator must therefore have intended that his wife should have the entire personalty held by him on the date of the execution of the will. This would include the money and notes received ten days previously from the sale of the 26 acre tract of land.

No intention appears in the will that any portion of the property devised to the wife upon her death to pass under the terms of the will to any other person, and the personalty therefore became undisposed property and passed under the law and not under the will.

Considerable stress is laid upon the use of the word "proceeds" as used in both Items 1 and 2 of the will.

In Item 1 the testator provides for the conversion by the executor after his death of the real estate of which he died seized. In Item 2, the word "proceeds" in like manner refers to that derived from a sale by the executor for the support of the wife. We find no reasonable basis for the claim that the term "proceeds" was intended to apply to real estate that he, himself, had converted into personalty prior to the time of the execution of the will.

It is also urged that Flora Shock Hern, by making a claim for the \$100, waived her right to participate as heir in the undisposed of property. The doctrine of election applies only where there are inconsistent rights. In the case at bar under the will, as we construe it, it is not inconsistent for Flora Shock Hern to claim the \$100 under the will and also to claim as heir in the undisposed of property. The doctrine of election does not, therefore, apply.

Counsel for plaintiff urged that the court should construe the will broadly and accomplish the purpose of the testator as reflected in his affidavit which he desired to be placed with the will.

There is no reference in the will to the affidavit and no dispositive clause in the affidavits can therefore affect the provisions of the will. We have considered the affidavits and the other evidence as circumstances throwing light upon the testator's intention, but we can not consider dispositive terms or expressions *de hors* the will for the purpose of adding to or controlling terms of the will. It, therefore, follows that Flora Shock Hern is entitled to participate with the other children in the distribution of the personalty arising from the lapsing of the legacy to the testator's wife.

We think the whole case is brought here by the appeal and that the petition in error should be dismissed.

Decree accordingly.

KUNKLE, J., and FERNEDING, J., concur.

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Cuyahoga County.

**COMPETENCY OF TESTIMONY BY CHILDREN OF
TENDER YEARS.**

Court of Appeals for Cuyahoga County.

W. C. CROUCH V. IRENE FISHBEIN, BY, ETC.

Decided, February, 1919.

*Evidence—Error in Admitting Testimony of a Young Child—Duty of
the Court When Such Testimony is Profered—Abuse of Discretion.*

1. When a child of tender years is offered as a witness, and objection is made to the competency of such witness, it is the duty of the court to examine or cause the witness to be examined, and to determine as a matter of law whether or not the witness has sufficient ability to receive impressions and relate truthfully facts and circumstances connected with the transaction. The question of whether or not the witness is competent to testify is left to the sound discretion of the trial judge, but such discretion is a legal discretion and subject to review in error proceedings duly prosecuted.
2. Where the incompetency of such a witness is apparent from a consideration of the testimony of the witness, the question of such competency may be raised at the close of the examination of the witness by a motion to exclude the testimony of the witness, although no objection was made at the time the witness was offered.
3. In this case the witness was five and one-half years of age and she testified to a transaction which occurred when she was four and one-half years of age; it is apparent that she knew nothing of the nature of an oath and the record discloses that at the time of the trial she was incapable of relating truthfully impressions received a year previous. *Held*, the trial court abused its discretion in overruling the motion to exclude her testimony.

Hoyt, Dustin, Kelley, McKeehan & Andrews, for plaintiff in error.

Harry C. Gahn, contra.

WASHBURN, J.

Error to the municipal court.

Defendant in error, when four and one-half years of age, was injured in a collision with the automobile of plaintiff in error

in one of the public streets in the city of Cleveland. She was crossing the street not at a crossing, and the evidence of negligence on the part of plaintiff in error, if any such there was, was very slight indeed. She recovered a judgment, and the matter is before this court for review on error.

As has been said, plaintiff was a little girl, four and one-half years old at the time of the accident, and the trial was had a year later. At the trial she was offered as a witness. At the close of her testimony a motion was made to exclude her testimony on the ground that she was not old enough to be a competent witness. That motion was overruled and exception taken.

There was no examination of the witness at any time to ascertain her ability to receive impressions, or her ability to relate facts and circumstances truthfully, and nothing was said in the charge of the court as to the duty of the jury in weighing and considering the testimony of a small child, and that, too, when the only other witness to the transaction on behalf of the plaintiff was a child five and one-half years old at the time of the accident and six and one-half years old at the time of the trial.

It is true that no request for such charge was made, and it is true also that when the youngest child was offered as a witness no objection was made to her testimony and no request was made for an examination to ascertain her qualifications. There was, however, as I have said, a motion to exclude her testimony at its conclusion, which was overruled and to which exception was noted.

At two places in her testimony, she said she did not know how old she was, and in another place she said her age was five and one-half years. At one place in her testimony she said that she was hit by the automobile, and in another place she says she did not know what hit her. She says that the accident occurred in the summer time, and that there was no snow on the ground, when it is admitted that it occurred in the winter time when there was a heavy fall of snow. She testified that she attended a kindergarten school, but she could not tell how long she had been going to a kindergarten, or what month she started, or whether it was in the fall.

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Most of the questions put to her were leading questions which could be answered by yes or no, and at no place in the record does it appear that she was asked to relate what occurred so that anyone hearing the testimony would have a better opportunity to form a judgment as to her ability to receive impressions and relate facts and circumstances truthfully.

The statute provides that:

“All persons are competent witnesses except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.”

It is well settled that when a child under ten years of age is offered as a witness, and objection is made to the competency of such witness, it is the duty of the court to examine the witness and determine as a matter of law whether or not the witness has sufficient ability to receive impressions and relate facts and circumstances connected with the transaction truthfully, and that the question of whether or not the witness is competent to testify is largely in the discretion of the trial judge.

While there are no reported cases on the subject in the Supreme Court of Ohio, there are such cases in other states, and no doubt the question has arisen many times in the lower courts of Ohio. There are reported cases where a child as young as six years of age has been held to be competent to testify. In the case at bar the child was attempting to relate impressions which were received when she was four and one-half years of age, and from an examination of the record we think that it appears that the plaintiff was incapable at that time of receiving just impressions of the facts and transactions respecting which she was examined, and at the time of the trial she was incapable of relating truthfully impressions received a year previous, and for that reason she was not a competent witness. We are not unmindful of the fact that no objection was made as to her competency at the time she was offered, and that no request was made of the court to charge the jury on the subject of the weight to be given to the testimony of witnesses of such tender years, but this was a trial conducted by a court charged with the duty of seeing

that justice was administered, and when a kindergarten witness of such tender years was offered, who manifestly knew nothing about the nature of an oath, it was the duty of the court to at least ascertain whether she knew right from wrong, and whether she knew that it was wrong to tell an untruth, and what was likely to happen if an untruth was told, and then to have her relate what took place in a narrative way in the first instance, and not have her testimony given almost entirely in answer to leading questions.

Considering the very tender years of this child, this was a duty which the court owed to the administration of justice, but as no objection was made by the plaintiff in error, he can not now complain because the court did not discharge that manifest duty. However, at the close of her testimony after her incompetency had been made apparent by the answers she gave to the questions propounded to her, the court should have granted the motion of the plaintiff in error to exclude her testimony on the ground that she was not a competent witness, and the plaintiff in error by his exception to that ruling placed himself in a position to take advantage of the error committed by the court.

We recognize fully that the decision of such matters should be left almost exclusively to the sound discretion of the trial judge, but in this case the witness, being so very young, and her incompetency so apparent, and her testimony so important (there being but one other witness to the transaction in her behalf, and she was only a year older), we feel that the court abused its discretion in permitting such child to testify, and for that reason the case ought to be, and is, reversed.

GRANT, J., and DUNLAP, J., concur.

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Hamilton County.

PRIORITY OF A MORTGAGE GIVEN FOR FUTURE ADVANCES.

Court of Appeals for Hamilton County.

**OSCAR W. KUHN, TRUSTEE, ET AL, V. THE SOUTHERN OHIO LOAN
& TRUST COMPANY.**

Decided, March 24, 1919.

Mortgage—Proceeds of Loan to be Paid in the Form of Future Advances—Priority of Lien not Destroyed—By the Filing of a Subsequent Mortgage before the Advances have been Paid.

Where a mortgage embodied the agreement that the funds which it secures are to be paid in the form of future advances, as provided in Section 8321-1, General Code, the priority of the lien thus secured is not defeated by the recording of another mortgage of subsequent date but before payment of the promised advances.

Oscar W. Kuhn for plaintiff in error.*George D. Harper and James B. Swing* for defendant in error.

SHOHL, P. J.

The Southern Ohio Loan & Trust Company brought an action in the court of common pleas to foreclose a mortgage for \$3,000 given by Luella C. Bagley and her husband. Oscar W. Kuhn, trustee, filed an answer and cross-petition alleging that he held a mortgage for \$2,000, which was prior in right to the mortgage of the loan and trust company and asked to be paid first out of the proceeds of any sale. The court adjudged the mortgage of the loan and trust company to be the first and best lien, and stated its findings of fact separate from its conclusions of law.

Plaintiff in error contends that the judgment is not supported by the findings of fact. The court found that on May 2, 1916, the Bagleys executed and delivered to the plaintiff a note for \$3,000 with interest and a mortgage to secure the same. The mortgage was duly recorded on May 6. It recited that it was given:

“to improve the premises described herein and pay off prior incumbrances thereon, and the mortgagor hereby consents and

agrees with the mortgagee that the funds may be paid out by the mortgagee as provided in Section 8321-1 General Code."

That section among other things, provides that the mortgagee shall not be required to pay out any of the mortgage fund for fifteen days after filing said mortgage. It also provides for the manner in which payments shall be made which are considered the same as if paid to the mortgagor. It contemplates turning over the money to the mortgagor, or persons for him, at the time subsequent to the recording of the instrument.

The consideration for the note and mortgage was paid by the Trust Company to the Bagleys, \$1,200 on May 8th, 1916, and the balance, \$1,800 on June 23rd, 1916. On the 8th day of May, subsequent to the payment of the \$1,200 and approximately six weeks prior to the later advances, the Bagleys gave Kuhn, trustee, their note and mortgage for \$2,000 which was recorded in the afternoon of that day.

Bagley was a contracting builder and erected a dwelling house on the property, for and under agreement with his wife who was the owner. The dwelling house was erected on the property and the money loaned by the loan and trust company was paid over to the Bagleys for the erection of the dwelling house. Kuhn, trustee, had knowledge of the erection of the dwelling house as aforesaid.

It will be seen, therefore, that the case is one in which a first mortgagor, who is obligated to make a further advance of \$1,800 in addition to \$1,200 already paid, makes the later advance after a second mortgage has been recorded.

The law permits and enforces mortgages to secure future advances. 1 Jones on Mortgages, Section 365, note 166. It is common practice in Ohio and elsewhere to arrange for mortgage loans, the proceeds of which are to be used for the construction of improvements on land, on terms whereby the lender agrees to advance specified amounts at certain stages of the progress of the work. If a later mortgagee by taking and recording his mortgage on an incompleated building acquires a better right than that of the first mortgagee as to the later advances, the first mortgagee

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is in a predicament. If he carries out his agreement and lends the money, he has lost his right to be secured on it. If he breaks his agreement and no more money is supplied to complete the structure, his security as to the advances already made is impaired.

One of the leading cases on the general subject of priority between consecutive mortgages is the decision of *Spader v. Lawler*, 17 Ohio 371. In that case a mortgage was made to secure future advances. A later mortgage was recorded prior to the making of the future advances. It was held that the second mortgage prevails as against the advances made on the prior mortgage subsequent to the recording of the second mortgage. The case has been followed in Ohio and is the settled law of the state. See *Choteau v. Thompson*, 2 O. S., 114; *West v. Klotz*, 37 O. S., 420. If the rule is of universal application it would compel the abandonment of the practice of financial institutions of advancing the amounts loaned, in instalments. Either they would have to give the borrower the full amount of his loan at once and trust him to improve the land, which in its unimproved state is not worth the amount of the mortgage, or they must risk the possibility of later mortgages, with the unhappy result above referred to. In *Spader v. Lawler*, the mortgage was to secure the loan—"and any other sum, or sums of money which the said Bonsal may be owing to the said Lawler," but Lawler was under no obligation to make any further advances.

While the question has never arisen in Ohio, there is a well established exception to the general rule. Where the mortgagee is bound by his contract with the mortgagor to make advances in the future, he will take precedence over any subsequent incumbrance given by the mortgagor, even if he knows of it at the time the advance is made.

The doctrine is stated in *Boswell v. Goodwin et al*, 31 Conn., 74:—

"Where a mortgage is given to secure future advances or liabilities, and the mortgagee has definitely agreed to make such advances or to assume such liabilities, the mortgage when re-

corded is a valid and fixed security, not affected by a subsequent mortgage of the same property, though the advances may be ~~vances made after notice of such later mortgage.~~" made or the liabilities assumed after the record of such later mortgage.

"Where, however, it is optional with the mortgagee to make the advances or not, and he has actual notice of a later mortgage upon the same property for an existing debt or liability, such later mortgage will take precedent of the prior one as to all advances made upon notice of such later mortgage."

This rule is also supported by the following:—*Tompkins v. Little Rock, etc. R. Co.*, 15 Fed., 6; *Board of Commissioners v. Wills & Sons*, 236 Fed., 362, 374; *Crane v. Deming*, 7 Conn., 387, 398; *Rowan v. Sharps Rifle Mfg. Co.*, 29 Conn., 282; *Schimberg v. Waite*, 92 Ill. App., 130; *Brinkmeyer v. Browneller*, 55 Ind., 487; *Schmidt v. Zahrndt*, 148 Ind., 447; *Nelson v. Iowa Eastern R. Co.*, 8 Am. R. Rep., 88; *Robinson v. Consol. Real Est. Co.*, 55 Md., 110; *Platt v. Griffith*, 27 N. J., Eq., 207; *Hyman v. Hauff*, 138 N. Y., 48; *Blackmar v. Sharp*, 23 R. I., 412, 419; *Alexandria Sav. Inst. v. Thomas*, 29 Gratt. (Va.), 483, 489; 1 Jones on Mortgages, 375; 11 Amer. Law. Reg. n. s., 273.

By the arrangement between the Southern Ohio Loan & Trust Company and the Bagleys, the Loan & Trust Company was bound to make advances in the future. They had a right, therefore, to carry out their agreement regardless of the later recorded mortgage. The judgment of the court below awarding priority to the Southern Ohio Loan & Trust Company for the full amount of the \$3,000 mortgage was correct and should be affirmed.

HAMILTON and CUSHING, JJ., concur.

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Cuyahoga County.

REVERSAL FOR LACK OF JURISDICTION.

Court of Appeals for Cuyahoga County.

D. C. MECK v. HENRIETTA D. GRAUEL.

Decided, February 7, 1919.

Jurisdiction—Objection to, First Made in the Court of Review—Reversal Granted and Cause Remanded.

Under the rule that objection to the jurisdiction of the court in which the action was instituted may be made at any time before judgment is actually entered, an action brought in the municipal court of Cleveland on two causes of action—for \$2,000 based on tort and \$500 on contract—will be reversed for lack of jurisdiction as to the first cause of action and an order made remanding the case for further proceedings.

H. Hughes Johnson, Esq., and H. W. Woods, for plaintiff in error.

John A. Cline Esq., contra.

GRANT, J.

Error to the Municipal Court of Cleveland.

In the view we take of this case we need discuss only one question—that of jurisdiction in the court below.

The plaintiff there—defendant in this proceeding—declared on two causes of action, one in tort, in which she laid her damages at two thousand dollars, and the other on contract, in which the amount claimed was five hundred dollars.

The law limiting, or bounding, the jurisdiction of that court, as to amounts—Section 1579-6, par. 2—General Code—is as follows:

“In all actions and proceedings at law for the recovery of money or personal property of which the courts of common pleas of the County of Cuyahoga, have, or may be given, jurisdiction, when the amount claimed by any party, or the appraised value of the personal property sought to be recovered, does not exceed

one thousand dollars, and in such actions judgment may be rendered for over one thousand dollars when the excess over one thousand dollars shall consist of interest or damages, or costs accrued after the commencement of the action."

It will be observed that the limitation thus provided, has to do, not with the amount *recovered*, but with "the amount *claimed*."

Having regard to the nature of the action, we must find that the jurisdiction of the municipal court is clearly denied by the statute; we see no escape from that conclusion.

Perhaps this is not disputed. But it is said that the point has been waived, or that the objection comes too late to defeat the action now—not having been asserted or mentioned up to the argument at the bar.

The suggestion is not allowable. The jurisdiction denied by the statute quoted is of the subject of the action—not of the parties to it.

The law controlling the question and covering all the points relied on to take off the effect of the statute, is stated in Volume 7, Ruling Case Law, pp. 1042-3 as follows:

"Where judicial tribunals have no jurisdiction of the subject-matter on which they assume to act, their proceedings are absolutely void in the strictest sense of the term; and a court which is competent to decide on its own jurisdiction in a given case may determine that question at any time in the proceedings of the cause; whenever that fact is made to appear to its satisfaction, either before or after judgment. Accordingly, an objection for want of jurisdiction, if it exists, may be raised by answer, or at any subsequent stage of the proceedings; and in fact it may be raised for the first time on appeal. A court will recognize want of jurisdiction over the subject-matter, even if no objection is made, and therefore whenever a want of jurisdiction is suggested, by the court's examination of the case or otherwise, it is the duty of the court to consider it, for if the court is without jurisdiction it is powerless to act in the case. A plaintiff against whom judgment went in the lower court may on appeal raise the question of the jurisdiction of the trial court and have the judgment reversed if the court did not have jurisdiction of the subject-matter, though the assumption of jurisdiction was to his advantage. As

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heretofore shown, the jurisdiction of a court over the subject-matter of a cause of action must be conferred by law, and it can not under any circumstances be conferred on a court, as such, by the consent of the parties. It naturally follows that if jurisdiction can not be conferred by consent, the want thereof can not be waived by any act of the parties."

This statement of the law applicable to, and decisive of this case, fits it like a wedding garment. It is backed by an ample line of authorities.

Indeed, to decide the main question of contention here, one need not go outside of this state or this court, to reach a like conclusion.

The case of the *State, ex rel Lander, v. Prestien*, was in mandamus. It was begun in the common pleas court of this county, from whose judgment the relator took an appeal to this court. It was fully heard by us, argued and submitted for final determination. While it was being thus held under advisement, the respondent moved to dismiss the appeal for want of jurisdiction under the then new constitution—the writ of mandamus not being of chancery cognizance.

The motion was granted. A rehearing was allowed and a bill of exceptions was taken, showing the facts of trial, argument and final submission, without objection or suggestion on the part of the respondent.

Again the motion to dismiss was sustained and judgment went against the relator for costs.

The Supreme Court reviewed the case and held that a motion to the jurisdiction, made at any time before judgment was actually entered, was not too late, and affirmed us. The case is reported in 93 O. S., 423.

It decides this case. The judgment is reversed—the trial court having no jurisdiction of the first cause of action.

The cause is remanded to the court from whence it came, for such further proceedings as may be in accordance with law.

DUNLAP, J., and WASHBURN, J., concur.

TESTIMONY ESTABLISHING A LOST WILL.

Court of Appeals for Scioto County.

HENRY EGBERT V. RUSSELL EGBERT ET AL.

Decided, December 11, 1918.

Wills—Instrument Lost which had been Deposited with the Probate Court—Admission of a Copy to Probate—Testimony Establishing the Contents—Presumption as to a Will Proven to have once Existed.

1. The contents of a lost or spoiled will may be established by the testimony of one witness.
2. When no evidence was offered on the trial to show when the will was lost or destroyed, whether before or after the death of the testator, the order of probate admitting the will to record is sufficient evidence of the existence of the will after such death to justify a verdict sustaining the will.
3. The presumption that, when a will once proven to exist and to have been in the custody of the testator can not be found after his death, it was destroyed by the testator *animo revocandi*, does not arise when such will was deposited in the office of the probate court and was never called for thereafter by the testator and could not be found a few days after his death or at any subsequent time.

Bannon & Bannon and *Edgar G. Millar*, for plaintiff in error.
Milner, Miller & Searl, for defendants in error.

SAYRE, J.

Error to the Court of Appeals for Scioto county.

April 1, 1913, Daniel Egbert, Sr., at that time temporarily residing in Columbus, Ohio, executed a paper writing purporting to be his last will and testament. July 28, 1913, the instrument was, according to the statute, deposited in the probate court of Scioto county, Ohio. September 4, 1917, Daniel Egbert, Sr., died. A few days after his death, perhaps the fourth, search was made for such paper writing and the same could not and never has been found. Upon application the probate

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court of Scioto county established the contents and admitted to probate and record the will of Daniel Egbert, Sr., on the theory that he had made and executed a last will and testament which had been lost or destroyed.

January 14, 1918, an action was commenced by Henry Egbert, one of his heirs, in the court of common pleas, in which it was averred that the contents of the alleged last will established and admitted to probate is not the last will of Daniel Egbert, Sr., deceased, and that he died leaving no will.

In the action to contest the will the proponents thereof offered a copy of the last will and testament as certified by the probate court, the order of probate, and rested.

The plaintiff then offered evidence showing that the will was never seen by anyone connected with the office of the probate judge after it was deposited there in 1913, and the deposition of Fred Geischel, who testified that he had no recollection of ever having signed the purported will of Daniel Egbert, Sr., or having been present at the time it is claimed the same was signed by Daniel Egbert, Sr.

Harford A. Toland, a witness for the proponents, testified that he drew the alleged will, saw it executed by the testator, and that he signed as a witness and that he saw Fred Geischel also sign the same as a witness; that the testator signed in the presence of the witness and Geischel, and that the testator acknowledged the signed instrument as his will in the presence of both witnesses. Mrs. Louise Johnson, a daughter of the testator and at whose home the will was drawn, testified that Geischel was called and came into her house to be a witness to the will, and that her father's mind at the date of the execution of the will "was just as clear as a bell."

Evidence was also introduced of declarations of the testator as to the contents of the will, and Toland produced his office copy of the will, which is the form of the will probated and recorded.

Further evidence was admitted that testator was never at the court house in Portsmouth after the will was deposited there in 1913, and that the testator declared on more than one occasion

that his will was at that place. Other declarations of the testator were admitted to the effect that his intention in the distribution of his property corresponded to the disposition of the same as appears in the paper writing admitted to probate and recorded as his last will and testament.

The verdict in the court of common pleas was in favor of the contestees.

We are convinced from the record that the evidence adduced on the trial in the court of common pleas to establish the lost or destroyed paper writing signed by Daniel Egbert, Sr., as his last will and testament, was of the character required by *Cole v. McClure*, 88 O. S., 1. The evidence of its execution and contents was "clear, strong, positive, free from bias, and convincing beyond a reasonable doubt." While the witness Geischel does not remember the transaction, Mrs. Louise Johnson testified he was present at the time of the execution of the will, and the testimony of Mr. Toland is convincing that the will was signed at the end thereof by the testator, and that it was attested and subscribed in his presence by Toland and Geischel, and that they saw the testator subscribe and heard him acknowledge the same as his last will and testament.

While there must be at least two witnesses to a will, the contents of a lost or spoliated will may be proved by the testimony of a single witness. Cyc., Vol. 40, p. 1299.

It is contended that the court omitted to state two vital issues in the charge to the jury: one, that before the will could be sustained the jury must find that the contents of the copy offered for probate is practically identical with the original; and the other, that the testator acknowledged the will to be his last will. But as the court's attention was not called to the omission or a request made to give such charge, we can not reverse the case for such omission. *State v. McCoy*, 88 O. S., 447.

The plaintiff in error claims that the judgment must be reversed because there is no proof that the will was in existence subsequent to the death of the decedent, on the authority of *Cole v. McClure*, 88 O. S., 1. But it will be observed in the last named case that there was evidence upon which the Supreme

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Court relied that the will admitted to probate and record was destroyed by decedent before he became insane. In our case it is undisputed that the will of Daniel Egbert, Sr., was deposited in the office of the probate court four years before his death; that it was never returned to him or anyone for him; that he referred to his will as being on deposit in the court house at Portsmouth, and that a few days subsequent to his death it could not be found; *but there is no evidence as to when it was lost, spoliated or destroyed, whether before or after the death of the testator.*

In suits to contest lost or spoliated wills the law of procedure is the same as in the contest of other wills (Section 10548). "On the trial of such issue the order of probate shall be *prima facie* evidence of the due attestation, execution and validity of the will or codicil." (Section 12083, *Behrens v. Behrens*, 47 O. S., 323.)

Whether or not the will was properly admitted to probate and record can not be inquired into in a suit to contest a will. (*Converse v. Starr*, 23 O. S., 491; *Stacy v. Cunningham*, 69 O. S., 176.)

In view of these propositions, there being no evidence in the case outside the order of probate as to when the will was lost, spoliated or destroyed, such order of probate is sufficient evidence of the validity of the will, and hence of its existence subsequent to the death of Daniel Egbert, Sr. When there is not such other evidence the order of probate is equivalent to evidence that is "certain, satisfactory and conclusive" that the will was in existence subsequent to the death of the decedent.

The court charged the jury as follows:

"It is the usual presumption that a will which had remained in the testator's custody, or to which he had access after its execution, and which can not be found after his decease, has been destroyed by the testator himself, with the intention of revoking it; but this presumption is entirely overcome and rebutted when it appears that such will was deposited by the testator, or by some one for him, according to law, with the probate judge, and that the testator did not thereafter have it in his possession or have access to it."

McGinnis v. McGinnis.

[29 O.C.A.]

This instruction is not erroneous. The presumption referred to arises from the fact that ordinarily and usually when wills known to have been in the custody of testators can not be found after their decease, they were destroyed by such decedents with the intention of revoking the same. Destruction of wills in the possession of decedents, *animo revocandi*, usually attends the fact that the same can not be found after their decease. But when a will is deposited with a public officer in accordance with a statute of the state and is never seen afterwards by testator or anyone acting for him, no presumption could arise that he destroyed it.

The judgment of the court of common pleas will be affirmed.

Judgment affirmed.

MIDDLETON and WALTERS, JJ., concur.

ALLOWANCE OF ALIMONY TO A WIFE MANDATORY, WHEN.

Court of Appeals for Lucas County.

JESSAMINE M. MCGINNIS ET AL V. DAVID W. MCGINNIS.

Decided, January 28, 1918.

Divorce and Alimony—Where a Divorce is Granted Wife Alimony Must be Allowed—Amount of Allowance Where Both are Earning Salaries.

1. While the duty to allow alimony to the wife is mandatory under the provisions of Sections 11990 and 11991 G. C., when a divorce is granted to her, yet those sections require the trial court to allow only such alimony as is reasonable and to make the same payable in such manner as is equitable.
2. Where the parties are about 40 years of age, in good health, have no children, have lived together three years, and the wife has property of the value of \$2,300 and is in receipt of a salary of \$98 per month for ten months of the year, and the husband has no property and receives a salary of \$100 per month, a judgment refusing the wife alimony other than \$300 already paid her as temporary alimony, and \$50 to be paid as an attorney fee to her counsel will not be reversed.

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O. S. Brumback, for plaintiff in error.

Marshall & Fraser, contra.

RICHARDS, J.

This is a proceeding in error to the court of common pleas to reverse a judgment of that court relative to alimony rendered on granting a divorce to the plaintiff. The parties to this action were married on December 20, 1913, and the wife commenced an action for alimony alone on May 18, 1916. Thereafter the husband filed a cross-petition for divorce, whereupon the plaintiff filed an amended petition asking for both divorce and alimony.

During the pendency of the action the court of common pleas allowed to the plaintiff temporary alimony at the rate of \$30 per month and under this order she has received some \$300 by way of temporary alimony. On the hearing of the case in the court of common pleas, a divorce was granted to the plaintiff, based on the ground of extreme cruelty, the decree finding that the plaintiff was entitled to recover no alimony other than \$50 which was therein allowed as attorney's fees for her counsel. The court adjudged that the husband pay this sum and also the costs of the action. It is to reverse this refusal to allow alimony, other than as stated, that she brings this proceeding in error.

The bill of exceptions discloses that the husband has no property, but is in receipt of a salary of \$100 per month as a mail carrier in the city of Toledo, and that the wife is a teacher in the public schools of that city, receiving a salary of \$98 per month for ten months in the year. She also has property which she received from her mother, amounting in value to about \$2,300, a part of which is now in cash and the remainder represented by a mortgage held by her. Each of the parties is about forty years of age and apparently in good health, and they have no children. Under these circumstances it is contended that the court erred in refusing to award to her a substantial sum by way of alimony, and it is insisted that the language of the statute is mandatory and requires the allowance of alimony. The right of the plaintiff to alimony is controlled by Sections 11990 and 11991 G. C. The first section requires, when a divorce is granted

because of the husband's aggressions, that the court shall restore to her any name she had before marriage, and allow such alimony out of her husband's property as it deems reasonable, having due regard to property which came to him by marriage and the value of his real and personal estate at the time of the divorce. The next section provides that such alimony may be allowed either in real or personal property or both, or in money, payable either in gross or installments as the court deems equitable. It will be noticed that by the terms of these statutes only such allowance is to be made as the trial court deems reasonable, having regard to the circumstances stated in the statute and that it may be allowed in such property and payable on such terms as the trial court deems equitable. The language of these sections has been held by our Supreme Court to be mandatory, but they can only be mandatory to the extent that the trial court shall make such allowance of alimony as it deems reasonable and payable out of such property and in such manner as it deems equitable. A large discretion appears to be vested in the trial court and this is, of course, a judicial discretion and subject to review by the court of appeals.

The trial judge in determining whether an allowance of permanent alimony should be made, manifestly considered all the facts and circumstances disclosed by the record, the duty to consider which is imposed upon him by statute. Considering the age and health of the parties, the fact of the salary received by each and that the husband had no property while the wife had the amount shown by the record, we can not see that the judgment is so manifestly against the evidence as to require a reversal nor that the action of the court was unreasonable or inequitable. The court allowed \$50 as an attorney fee for plaintiff's counsel and was, of course, advised of the fact that some \$300 had already been paid by way of temporary alimony. While the language of the sections is mandatory, these sections do not require the allowance of alimony other than shall be found to be reasonable and equitable.

Finding no reversible error the judgment will be affirmed.

KINKADE, J., concurs; CHITTENDEN, J., not sitting.

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Coshocton County.

ACCOUNTING AS TO PURCHASE OF STOCK.

Court of Appeals for Coshocton County.

JESSE McCLAIN v. M. D. CUSTER, ET AL.

Decided, June 17, 1918.

Agency and Trust Relationship Distinguished—Degree of Proof Required to Establish Agency and to Establish a Trust.

An action which seeks to charge the defendant as agent and trustee must fail, where there is such a conflict in the testimony as to indicate the minds of the parties never met in contractual relationship, from which it necessarily follows that no contract being shown there was no trust relationship established.

Joseph L. McDowell, W. S. Merrell, and J. B. Shepler, for plaintiff.

W. R. Pomerene and C. B. Hunt, contra.

HOUCK, J.

Heard on appeal.

This is an action brought by the plaintiff, in which he seeks to charge the defendant M. D. Custer, as agent and trustee, for the purchase of twenty shares of the common capital stock of the Fairfield Paper Company, which the said Custer is alleged to have purchased for plaintiff and in violation of his duties as such agent and trustee took the title thereto in his own name, and disposed of said stock without turning over any part thereof to the plaintiff. The answer of the defendants in substance is a general denial of all the material averments of the petition.

Two issues of fact are raised by the pleadings. First, was the defendant Custer the agent of plaintiff? Second, was the defendant Custer the trustee of plaintiff?

The plaintiff has the burden of maintaining these facts, and he must sustain them by that degree of proof required by law. The degree of proof required as to the first issue of fact is by the weight of the evidence; and as to the second, it must be established by clear and convincing evidence.

This difference in the degree of proof required to sustain these two facts is readily understood when we call to mind that agency differs in many important respects from what is usually designated as a trust. While it is true that agency is sometimes defined as a relation of trust and confidence, and therefore property in the hands of an agent is frequently held to be impressed with a trust for the benefit of the principal, nevertheless, the two relations can not properly be claimed to be alike.

Agency is a contract, and it is necessary that the minds of the alleged contracting parties should meet, and this must be done, as shown by the evidence, before the claim of agency will be sustained.

While a trust involves control of property, agency, within itself, does not. A trustee usually holds the legal title, while an agent ordinarily does not. Trust is not considered a contractual relation, while agency is so regarded.

This leads us to the proven facts in the case as contained in the transcript of the testimony taken in the common pleas court, and the two transcripts of the testimony as taken in this court. We have read all of it with much care, and we find, upon the two issues of fact presented for our solution, a conflict of testimony of such a character that we find that the minds of the parties to this law suit never met in contractual relationship, as contemplated by law under the rules as hereinbefore laid down. And having thus found, it also naturally follows that there is a failure of proof to create a trust relationship between the plaintiff and the defendant Custer.

When the plaintiff filed his petition, setting forth his alleged claims, he took upon himself the burden of establishing each and all of the material allegations contained therein by that degree of proof required by law. The evidence offered in the case, as disclosed by the transcripts of testimony, does not measure up to the degree of proof thus required; and having thus found, it is the duty of this court to dismiss the petition of plaintiff, which is now done.

POWELL, J., and SHIELDS, J., concur.

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To the relic of a couple who in the lifetime of the decedent entered into a separation agreement which provided that neither should inherit from the other. 529.

DEVISE—

Where an estate in fee simple is devised in clear and unequivocal terms, it will not be cut down or limited by a subsequent clause less conclusive. 316.

Where the primary devise in fee simple takes effect upon such devisee arriving at majority, and the secondary contingent estate is devised to the children of the first devisee upon his death, the latter estate will be limited to the contingency of the death of the first devisee during his minority and

before the fee simple devise becomes effective. 316.

The devise of the remainder of an estate to the heirs of the testator and his wife to be divided equally share and share requires that the distribution be *per stirpes* and not *per capita*. 349.

A devise in full of all interest in testator's property does not bar participation in a lapsed estate. 423.

Devise to a daughter "in full of her share in the estate;" participation by her in a lapsed bequest. 567.

DISCRETION—

Mistaken exercise of judicial discretion in the admission of testimony by a child of tender years. 573.

DITCHES—

No relief will be granted from the assessment for a ditch improvement which made the situation worse rather than better, where the complaining property owners procured or acquiesced in the making of the improvement with the expectation that it would prove beneficial. 246.

DIVORCE AND ALIMONY—

It is immaterial whether an application for reduction of alimony be made in the form of a petition or motion, if the application is regularly filed and sets forth the grounds upon which a change is asked. 74.

In reviewing an order terminating alimony the court will presume, in the absence of a bill of exceptions containing all of the evidence, that the court below had before it evidence as to property out of which the allowance could be made and that it was made in accordance with law. 74.

Changed conditions may justify a reduction in the allowance without justifying its discontinuance altogether. 74.

At the hearing of a motion to terminate an allowance of alimony it is error to refuse to permit

the introduction of evidence tending to show that the allowance named in the decree was fixed by agreement and that such agreement was brought to the knowledge of the court at the time the decree was granted. 232.

Failure of jurisdiction as to the prayer for divorce is not a bar to further prosecution of the action for alimony. 555.

While the duty to allow alimony to a wife to whom a divorce has been granted is mandatory, the trial judge is required to allow only such an amount as is reasonable and to make it payable in some equitable manner. 588.

Refusal to allow further alimony to a wife who had already received \$300 and an attorney's fee of \$50 and had property of the value of \$2,300 and a salary of \$98 a month ten months in the year. 588.

ELECTRIC LIGHT—

Relief can not be given by the courts against the provision of the public utilities act which permits the commission to authorize an increase in rates which will be effective notwithstanding existing contracts with customers at the lower rate. 266.

EMINENT DOMAIN—

In an action by a railway company of foreign incorporation to appropriate property in Ohio, a declaration of necessity by the board of directors is jurisdictional; and where such declaration is not made until after proceedings have been begun, jurisdiction is not acquired and the action must be dismissed. How necessity may be shown. 97.

ESTOPPEL—

Against denial of liability under a mutual benefit insurance policy for delinquency in payment of premiums, where overdue premiums had been previously accepted. 321.

EVIDENCE—

Undue influence in the making of a will is generally shown by circumstantial evidence. 142.

The scrivener of a will may be called for cross-examination, when. 177.

Competency of declarations made by the testator before and after executing his will. 177.

Sworn testimony may not be disregarded by the jurors in a will case and their own experience substituted therefor. 177.

Degree of proof required to establish fraud in a will case. 177.

That sparks were emitted by more than one locomotive is not prejudicial in an action for recovery of loss from fire caused by a locomotive. 257.

Competency of evidence tending to show that sparks from locomotives had failed to set fire to combustible material placed beside the track, where the conditions were dissimilar from those existing at the time of the fire complained of. 257.

Where testimony against interest is considered worthy of credit, that which is favorable to the witness must also be received. 311.

An executor is made a competent witness for all purposes by being called by an exceptor for a single purpose. 311.

Counsel may comment on failure of opponent to call certain witnesses. 447.

A trust can not be established on evidence which has been found insufficient to show agency. 591.

Evidence establishing a lost will. 504.

Judgment held not against the weight of the evidence where given for injuries to a boy sixteen years of age who was required to shift a belt with his hand. 513.

Competency of the testimony of a child of tender years; duty of the trial judge when such testimony is offered; abuse of judicial

discretion in the admission of such testimony. 573.

Competency of evidence to the effect that school children were in the habit of taking a short cut across the street at the point where one of their number was struck by an automobile while so crossing the street. 558.

EXECUTION—

Failure by a sheriff to levy a writ of execution renders him and his sureties liable, where the writ came from another county bearing the endorsement "fees on deposit for service of this writ." 328.

EXECUTOR—

Where power is conferred upon an executor to sell or lease property, it is not affected by a contest of the will where the result is a judgment upholding the will; authority to sell and invest includes authority to lease with privilege of purchase. 17

Where prevented from testifying by reason of the provisions of Section 11495, an executor is made competent for all purposes by being called by the exceptor for a single purpose. 311.

FEDERAL EMPLOYERS' LIABILITY ACT—

Apportionment of damages under this act, where the negligence of the decedent contributed to his own death. 385.

FINAL ORDER—

The granting by the common pleas of a motion to discharge an attachment, in an action appealed from a justice of the peace, is a final order from which appeal may be taken to the court of appeals. 31.

A judgment by default in an action for damages, finding that plaintiff is entitled to recover and sending the case to the jury, is not a final order or judgment to which error can be prosecuted. 429.

An order quashing service of summons is not a final order or judgment to which error can be prosecuted. 375.

FORECLOSURE—

Marketable character of title obtained at a foreclosure sale; rights of the mortgagee; failure to cancel the mortgage does not leave a cloud on the title obtained by the purchaser; use of the word "heirs" not necessary to indicate perpetuity of title. 89.

GAS AND OIL—

Liability for permitting oil to escape into a coal mine is not affected by the trespass of the mine owner. 58.

GUARDIAN AND WARD—

It is the duty of a guardian of a tenant in common, who is under mental disability, to pay taxes on his ward's property, and title to the property can not be acquired by the guardian by permitting the taxes to become delinquent and buying it in at a tax sale. 462.

HEIR—

Widow not an heir *per stirpes* of her deceased husband, when. 153.

Status of heir of one begotten out of lawful wedlock established by the will of the putative father. 118.

HUSBAND AND WIFE—

A husband in possession of the separate property of his wife, whether with or without her consent, must be deemed to hold it in trust for her in the absence of direct evidence that she intended to make a gift of it to him. 359.

The right to bring an action for alienation of affections is limited to four years from the time the cause of action accrued. 492.

The marital relation is invaded, and a cause of action for alienation of affections accrues, when-

ever a third person, by enticement seduction or other wrongful and intentional interference with the marriage relation, deprives either the husband or wife of the consortium of the other. 492.

A married woman may maintain an action for recovery of damages for criminal conversation with her husband. 492.

A provision in a separation agreement barring either from any right of inheritance from the other is not effective where one died intestate and without issue or legal representatives, leaving property which did not come by descent, devise or deed of gift. 529.

INFANTS—

Judgment entered by confession before a magistrate for the purpose of effecting a settlement in favor of a minor, who afterwards claimed he was not legally represented or his rights properly protected; right of the minor to prosecute error upon becoming of age. 238.

Judgment in favor of a minor taken for the purpose of settlement of a claim for injuries, set aside for want of jurisdiction. 513.

Abuse of judicial discretion in the admission of testimony by a child of tender years. 573.

INJUNCTION—

Where granted against a corporation is operative against the company as reorganized, when. 165.

Does not lie to restrain collection of an assessment for improvement of a street on an allegation by abutting owners as to the poor quality of the work done, when. 281.

INSURANCE, ACCIDENT—

When a policy will be so construed as not to require the holder to give notice of an accident within the prescribed thirty days, if no serious injury was indicated at the time of its occurrence;

where the injury was to the eyesight and did not become apparent until ten months later, liability held to attach when notice was given as soon as the injury developed. 486.

A policy holder who sustained injury to his eyesight, which did not appear immediately but existed in a latent condition for a considerable period, will be held to be protected notwithstanding no notice of the injury was given within the prescribed time, where the policy contains a provision that the full amount of the policy shall become payable in case of irrecoverable loss of the entire sight within two hundred weeks. 486.

The requirement in a policy covering a motor vehicle and limited to bodily injuries, that immediate written notice shall be given to the company upon occurrence of an accident, does not require the giving of notice of an accident in which the machine covered by the policy was involved but which did not result in bodily injuries. 300.

Where it did not appear at the time of the accident but developed later that bodily injuries had resulted, it is a sufficient compliance with the terms of such a policy as to notice, if within a reasonable time after it became known to the assured or his chauffeur that injuries had been suffered, written notice of such fact is sent to the company. 300.

Liability to any person or persons on account of injuries suffered by reason of an automobile held to have been limited under the provisions of the policy to \$5,000. 175.

INSURANCE (Fire)—

Action for recovery for loss from fire caused by sparks from a locomotive; insured and insurer are proper parties plaintiff; competency of evidence with reference to the emission of sparks by locomotive. 257.

INSURANCE (Life)—

Grandchildren have no interest in a policy of life insurance made

payable to their grandmother, or in case of her death before that of the insured then to their children, where the death of the parent through whom they claim preceded that of their grandmother. 161.

A provision in a mutual benefit policy for forfeiture for non-payment of premium within a specified time is waived by the acceptance of premiums which were overdue; a policy is not canceled *ipso facto* by delinquency. 321.

INTERURBAN RAILWAY—

As to authority to grant an order to dismantle and abandon. 42.

INTOXICATING LIQUORS—

A liquor licensee can not complain, when prosecuted for keeping a place where intoxicating liquors are unlawfully sold, that he was given no preliminary examination, where he made no demand therefor nor any claim of a previous conviction, but went to trial on the merits. 534.

Proof that the defendant had given instructions in good faith to his barkeeper not to make unlawful sales is no defense in a prosecution for keeping a place where intoxicating liquors are sold contrary to law. 534.

Evidence of a single sale to a minor, in a room equipped with bar fixtures and conducted as a saloon, justifies a conviction of keeping a place where intoxicating liquors are sold. 529.

JOINDER—

Insurer and insured are proper parties plaintiff to an action for recovery of loss from a fire caused by sparks from a locomotive. 257.

JUDGMENT—

By default in an action for damages not one to which error can be prosecuted. 429.

The vacation of an entry of satisfaction is without effect where made after term and without following the course prescribed by the statute. 449.

May be entered by the trial judge for the plaintiff after granting a motion for a new trial, when the undisputed facts developed during the trial entitle him to judgment. 455.

Direct and collateral attack upon. 513.

A judgment is not against the weight of the evidence where it is for injuries sustained by a boy sixteen years of age who was required to shift a belt with his hand and it was in dispute whether he had been properly instructed as to how the shift could be made with safety. 513.

JUDICIAL SALE—

Purchaser takes title free from all rights of all parties to the action; rights of a mortgagee dependent upon the result of the foreclosure suit; entry of cancellation of the mortgage not necessary to remove all cloud upon the title when a proper foreclosure sale has been made; heirs of the original owner estopped from setting up any claim against the purchaser, although the deed failed to use the word "heirs" in either the granting or habendum clauses. 89.

JURISDICTION—

Where on appeal from a justice of the peace the common pleas grants a motion to discharge the attachment, its action in so doing is a final judgment from which appeal may be taken to the court of appeals. 31.

Of error proceedings brought by a minor after becoming of age in which he claims judgment was taken in his favor for an inadequate amount during his minority without his being legally represented. 238.

Under the rule that objection to the jurisdiction of the court may be made at any time before judgment is actually entered, the judgment in an action based on two causes as to one of which the court was without jurisdiction will be reversed by a reviewing court and the case remanded for further proceedings. 581.

May be controverted by evidence in spite of recitals in the record below, when. 513.

A minor being without capacity to appear as plaintiff in an action for injuries or to waive any of his rights, and his mother without authority to waive for him, a judgment taken in his favor for the purpose of giving validity to the settlement of a claim for injuries may be set aside for want of jurisdiction. 513.

It is error to sustain a general demurrer to a petition praying for divorce and alimony, where the petition sets forth facts constituting a good action for alimony alone, although fatally defective as one for divorce because of lack of residence within the state for the full period of one year. 555.

JURY—

The three-fourths jury law applies to verdicts assessing the value of land taken for a county road. 236.

JUSTICE OF THE PEACE—

The provisions of Section 10216, fixing the time within which an act is required by law to be done, applies to practice before justices of the peace. 127.

An appeal bond, perfected before a justice of the peace within ten days from the date of entering judgment, is not open to attack on the ground that it was not perfected within the time required by law. 127.

LANDLORD AND TENANT—

A lessee, holding over under an option to do so, becomes bound for a new term; notice of intention to exercise the option not necessary, when. 168.

LAST CHANCE—

See NEGLIGENCE.

Doctrine of, as applied to one who was struck by an interurban car in the open country. 401.

LEGITIMACY—

Established by the will of the putative father. 113.

LIENS—

The Torrens law constitutes an exception to the mechanics' lien law; right to file a mechanic's lien lost, when. 33.

An action to enforce a mechanic's lien is appealable. 65.

LIENS (Mechanics')—

Lienholders protected where their failure to follow the strict letter of the law in the matter of filing their liens was due to deception practiced by the owner; as to the limit of time for filing liens where the work is left incomplete. 253.

A mechanic's lien does not depend upon the contract under which the work was done or material furnished but on the fact that labor and material were furnished. 455.

The statutory provision that "until the statements provided for in this section are made and furnished in the manner and form as herein provided * * * the subcontractor shall have no right of action," does not require the subcontractor to furnish such statements directly to the owner unless required so to do by the owner; it is sufficient if he furnish such statements to the original contractor, whose duty it is to furnish them to the owner. 455.

Where a contract is awarded to a partnership, and one of the partners abandons the work and the other goes on and completes it, the latter may file a mechanic's lien. 455.

LIFE ESTATE—

Remainder held to have vested in sons, notwithstanding they were survived by the life tenant. 417.

LIMITATION OF ACTIONS—

An action for alienation of affections must be brought within four years from the time when it accrued. 492.

LOAN—

Where to be in the form of future advances, the mortgage securing the loan does not lose its

priority by the filing of a subsequent mortgage before the advances have been paid, when. 577.

MANDAMUS—

Does not lie to compel a trial judge to sign a bill of exceptions which he has found not to be a true bill. 13.

MARRIAGE—

The validity of a marriage must be determined by the *lex loci* of the place where contracted; common law marriages are unknown to the French law, and parties thereto are not subject to prosecution for adultery after contracting a valid marriage in Ohio. 97.

MASTER AND SERVANT—

Where a contract of employment provides that the work shall be done to the satisfaction of the employer, he is at liberty, acting in good faith, to discharge the employee without regard to the question whether the discharge would appeal to reasonable men as justified. 145.

Recovery may be had on an implied contract where a woman performs service in the home of a man where she lived, if she is not kin by blood or related by intermarriage. 172.

An employee subjected to lead poisoning, not in the course of his occupation but through the negligence of his employer, is a victim of personal injuries sustained in the course of his employment as these words are used in the workmen's compensation law. 221.

MINORS—

See INFANTS.

MORTGAGE—

Priority of a mortgage given for future advances not destroyed by the filing of a subsequent mortgage before the advances have been paid, when. 577.

MOTOR VEHICLES—

What constitutes "immediate" notice of an accident to a machine covered by an indemnity policy,

where the occurrence of bodily injuries was not discovered until some time later. 300.

MUNICIPAL CORPORATIONS—

In case of conflict between an ordinance of a charter city, having reference to a matter of purely local concern, and a state law covering the same subject, the ordinance is supreme and the conflicting provision of the statute falls. 49.

An ordinance of the city of Cleveland, limiting the size of loads which may be drawn over the streets of the city, is not affected by the fact that a state law provides a different maximum load. 49.

What it is necessary to allege and prove in an action to recover the value of goods or property destroyed to prevent the spread of an infectious disease; liability does not arise where the property was of such a character that its becoming infected could have been prevented. 76.

Strict compliance with statutory provisions required in construction of water works; competitive bidding not avoided by fact that streets upon which pipes are to be laid have not been dedicated; contract to lay pipes rendered invalid by failure to advertise for bids; liability not created by usage or custom; use of pipes does not constitute conversion. 129.

Local authorities may exercise a degree of discretion in the enactment of laws regulating, under the police power, the operation of such lines of business as affect the morals of the community. 225.

Validity of an ordinance forbidding the granting to an alien of a license to operate a pool or billiard table for hire. 225.

Mandamus does not lie to compel the mayor of a village to sign a contract which has been entered into by council for a public improvement, where the advertisement calling for bids for the proposed work appeared on the 7th

and 11th and bids were opened on the 15th of the month. 458.

MUTUAL BENEFIT SOCIETIES—

The general rule that forfeitures are not favored is without application in the case of a beneficial order operating on the assessment plan, where the constitution and by-laws provide that members in default in payment of assessments shall forfeit all right to indemnity or benefits of any kind. 475.

Acceptance of previous delinquent assessments does not estop the society from denying any right of recovery in the case of a member whose death occurred during the period of such delinquency. 475.

NEGLIGENCE—

A railway company can not contract to relieve itself from its own negligence. 290.

Where two railway companies use the same track for a certain distance, a clause in the contract relieving the owning company from loss or damage occasioned by the operation of the tenant company's cars does not relieve the owning company from such liability, where the injury was due to a car of the tenant company being thrown from the rails because of the bad condition of the track. 5.

Duty of an interurban railway company toward passengers crossing its parallel track after leaving a car on its own right-of-way; degree of care required from an alighting passenger. 8.

High degree of care required in the protection of Pullman passengers. 81.

Where both parties are charged with negligence, the judgment will not be disturbed unless it is clearly against the weight of the evidence. 206.

On the part of an employer in subjecting an employee to lead poisoning not in the course of his employment. 221.

The proximate cause of the death of an employee from lead poisoning is the negligence of the employer, where the disease was not contracted in the ordinary course of his occupation but through the negligence of the employer. 221.

Failure to state a cause of action to the jury is not ground for dismissal where the facts recited warrant an application of the doctrine of *res judicata*; specific grounds of negligence are not required in such a case. 273.

Liability of the proprietors of a theater to a woman patron whose chair gave way, throwing her to the floor and causing a miscarriage. 273.

Woman on back seat of an automobile killed by collision with an interurban car, the approach of which was concealed by the station building; woman not engaged in joint enterprise with driver of the automobile, and traction company held liable if the negligence of the motorman combined with that of the chauffeur combined to cause the accident. 284.

Of corporate directors; action to recover for losses resulting from the negligence of. 230.

Where an automobile which was being driven slowly near a street intersection was damaged by running into an iron standard such as is sometimes placed near the outer rail of the street car tracks for the purpose of regulating traffic. 271.

Apportionment of damages under the federal employers' liability act; burden as to contributory negligence; pecuniary value of care, attention, training and advice of parent may be awarded for wrongful death of such parent; measure of damages where the decedent and his wife were living apart. 385.

Where a motorman maintains as vigilant an outlook as is consistent with the paramount duty owing to the passengers in his charge, he can not be held responsible for failing to discover what

he did not and could not see by the exercise of ordinary care. 401.

Where it appears that the decedent misjudged the time which would be required for a car approaching at high speed to reach him, and in attempting to cross the track in front of it was struck and killed, a verdict in favor of the company will not be set aside on the ground of the weight of the evidence. 401.

Man killed by a stallion; failure of evidence on a material allegation as to negligence of the owner. 437.

Where a wrong transfer was issued to a street car passenger with the result that he was ejected when he attempted to use it; ordinary care required of passenger in accepting a transfer to see that it is correctly punched. 539.

For a pedestrian to attempt to cross the street at a point other than where there is a regular crossing for pedestrians is not negligence as a matter of law in the absence of an ordinance forbidding such use of the streets. 558.

Whether reasonable care was used by a pedestrian who was struck by an automobile while attempting to cross a street midway between crossings is a question for the jury, depending somewhat on the age, intelligence and experience of the one so injured. 558.

While the driver of an automobile is bound to use special caution at street crossings to avoid striking pedestrians, he is bound at all times to keep within the speed limits and to use due care to prevent striking persons who may be in the street. 558.

The admission of testimony to the effect that school children were in the habit of taking a short cut across the street at the point where the accident complained of occurred is not prejudicial to one whose machine struck a child at that point, where the jury were charged that such testimony was without effect upon him unless the practice of children so to do had

been brought to his knowledge. 558.

Application of the doctrine of discovered peril; duty of averting accident to one in danger through his own negligence; limitation of liability based on failure to make the utmost use of the last chance. 545.

The humanitarian doctrine of the last chance is not applicable in a case where contributory negligence had first intervened and the testimony indicates that it would have been physically impossible to have effected his rescue within the time and under the circumstances presented at the moment his position of danger was discovered. 545.

NOTICE—

Notice by a lessee to his lessor of intention to hold over under a provision of the lease granting that privilege is not necessary, when. 172.

Construction of the word "immediate" with reference to the giving of notice to an indemnity insurance company of the occurrence of an accident on account of which a claim may be made against the company. 300.

Construction of provision in an accident insurance policy fixing a time limit for giving notice of an accident. 486.

Effect of failure to give notice to an endorser of failure to pay an instalment becoming due on a note. 561.

OFFICE AND OFFICER—

Appointive positions in the health department are abolished by repeal of the ordinance establishing such positions. 140.

Prosecution of a councilman for receiving money to influence his vote; method of charging duplicity; different offenses not charged by alleging different acts which are component parts of the same offense. 393.

OPTION—

What constitutes "reasonable time" where used in connection with an option. 201.

PARTIES—

Necessary parties to an action in mandamus to compel provision of proper school advantages. 46.

The state is not a party in interest under a bond running to a municipality. 95.

PARTITION—

Where one of the devisees of land dies without issue before the life tenant, his widow takes a life estate and is entitled to an accounting of rents and profits from the date of the previous life tenant, but partition may not be had without the consent of all parties in interest unless the interest of the said widow can be set off by metes and bounds without depreciating the value of the remainder of the land. 85.

PLEADING—

Where a petition alleges specific facts which constitute a *prima facie* case of negligence, demurrer does not lie on the ground that the negligence is not alleged in terms. 271.

Answer construed as a general denial amplified by evidential facts. 519.

PRESUMPTION—

A real estate broker has a right to rely on the presumption that the party contracting with him for the sale of a certain piece of property will be able to perform his part of the contract and furnish title to a prospective purchaser. 481.

Where a petition asked for relief which the court had the power to grant, and a decree was entered in accordance therewith, it will be presumed in subsequent collateral proceedings that all incidental questions were duly considered. 497.

Of the death of one mysteriously missing. 524.

As to will proven to have once existed. 584.

PRIORITY—

Of a mortgage given to secure future advances, where a subsequent mortgage was filed before the advances had been paid. 577.

PROMISSORY NOTES—

When a promissory note is made payable in installments, the promise to pay each installment is a separate note in itself. 561.

An endorser of a note payable in installments is entitled to notice of the non-payment of each installment, and if such notice is not given he is entitled to a discharge from all liability with respect to such installment. 561.

THE PUBLIC UTILITY COMMISSION—

Alone has authority to grant permission to abandon an interurban road. 42.

Receivers of an interurban road, appointed to preserve and operate the property pending a settlement with creditors, are without authority to apply for an order to abandon and dismantle the line; such an application must come from the company itself. 42.

PUBLIC CONTRACTS—

A contract for improving a road by the state highway commissioner is rendered invalid by giving less than two full weeks notice by advertisement. 382.

REAL PROPERTY—

Sufficiency of a contract for purchase of real estate; duplicate receipt for earnest money. 63.

REASONABLE TIME—

For the return of stock held under an option of purchase. 201.

When the question of reasonable time is one for the jury and when for the court; circumstances which may affect the time permissible. 201.

REGISTRATION OF LAND TITLES—

The registration of titles under the Torrens act is valid as to persons in being who are capable of and do appear and defend. 316.

RES IPSA LOQUITUR—

Application of the doctrine of, to the case of a woman whose chair in a theater gave way, precipitating

her to the floor and causing a miscarriage. 273.

REVERSAL—

Granted on review for lack of jurisdiction of one of the causes of action in the court below. 581.

ROADS—

The three-fourths jury law applies to verdicts assessing the value of land taken for a county road. 236.

Gasoline and oil used in the transporting of material for the improvement of a road may be treated as a part of the material used. 346.

A statute requiring the state highway commissioner before letting a contract to build an improved road to "advertise for bids for two consecutive weeks," is mandatory and must be strictly complied with. 382.

The term "two consecutive weeks" as used in the statute means two full weeks. 382.

SALES—

Efficiency of apparatus sold; warranty express or implied. 276.

Dried apples sold by sample, afterward condemned as unfit for food; seller held not liable where buyer had opportunity for inspection. 543.

SCHOOLS—

Necessary parties to an action in mandamus to compel provision of proper school advantages; evidence required to compel official action. 46.

Transportation can not be required for children attending a nearer school in another district. 444.

SENTENCE—

In misdemeanor cases the trial court has power to suspend in whole or in part the execution of a sentence, at any time during the term in which the sentence was passed, even though the defendant has entered upon his imprisonment. 305.

SERVICES—

The fact that a woman lives in the home of a man and performs services for him does not create a family relationship, where the parties are not of blood kin or related by intermarriage, and there may be recovery under an implied contract for the service so rendered. 172.

SHERIFF—

Liable for failure to levy a writ of execution from another county bearing the endorsement that fees are on deposit for service of the writ. 328.

SLEEPING CAR COMPANY—

A claim against a sleeping car company for money stolen from a berth may be prosecuted as a tort or as one arising upon contract; if based upon the contractual relation, the six rather than the four years statute of limitations is applicable. 81.

Conclusion that if the porter took the money it was while acting in the course of his employment, unavoidable, when. 81.

Reasonable amount of money for a passenger to have in his possession while traveling. 81.

SPECIFIC PERFORMANCE—

Will not be decreed unless the remedy is mutual; a conditional acceptance of an offer to buy or sell is equivalent to a rejection; where co-tenants have refused to join in an agreement to sell, a conveyance may be enforced of the undivided interest of the one making the agreement. 337.

STATUTES CONSIDERED—

Sections 8572 *et seq.*, known as the Torrens law. 33.

Section 8308 *et seq.*, known as the mechanics' lien law. 33.

A contract for the purchase of real estate is not sufficient to bind the purchaser under the statute of frauds, unless. 63.

Section 8573, providing the order of descent when the title came by descent, devise or deed of gift. 85.

Section 8591, providing when an

illegitimate child shall be deemed legitimate. 113.

Section 10206, fixing the manner of computing the time within which an act is required to be done. 127.

Section 10383, relating to bond on appeal from a justice of the peace. 127.

Section 8970, creating absolute liability against railway companies for losses by fire caused by sparks from locomotives. 257.

Section 8392, relating to express warranty. 276.

Section 8312, relating to mechanics' liens. 455.

Sections 11990 and 11991, relating to alimony. 588.

Sections 8224 and 8296 of the negotiable instruments code. 342.

Section 1208, relating to the bond required of a road contractor. 346.

STREETS—

Regulations in a charter city as to maximum loads which may be moved over the streets. 49.

Prescriptive title may be acquired by an abutting owner to a street or alley. 219.

Collection of an assessment for a street improvement can not be enjoined by abutting owners complaining of the character of the work done, when. 281.

STREET RAILWAYS—

Where two lines use the same track for a distance, the owning company can not contract to relieve itself from liability for damage or injury caused by the operation of the tenant company's cars, when. 5.

While a passenger alighting from a standing car is not relieved from using ordinary care, he is not required to anticipate negligence; not contributory negligence for an alighting passenger to fail to look and listen for a car on the parallel track, when. 8.

The degree of care required of a passenger with respect to the correct punching of a transfer issued to him. 369 and 539.

Liability of company for the ejection of a passenger to whom a wrong transfer had been issued. 539.

SUBROGATION—

An insurance company is subrogated to the rights of the policy holder who has suffered loss from fire which was started by sparks from a locomotive. 257.

SUMMONS—

Where the president of an Ohio corporation is a non-resident of the state and absent therefrom, service of summons on the corporation may be made on the vice-president. 375.

The quashing of service of summons is not a final order to which error can be prosecuted. 375.

SUNDAY—

The keeping open of a place for the sale of meat on Sunday, in a district thickly populated by the tenement class who are not provided with ice boxes or other means for preserving meat, is not a work of necessity when the weather is sufficiently cold to preserve meats and vegetables. 111.

SURETY—

A surety may plead as a set-off an indebtedness existing in favor of the principal debtor against the holder of a note. 342.

The surety on a contract for a road improvement is liable for gasoline and oil furnished the contractor for use in motor trucks engaged in transporting material for use on the road covered by the contract. 346.

TAXATION—

The placing of chattel property in the custody of a warehouseman on the tax duplicate and the charging of it as one item against him individually may be enjoined; but such property may be listed by the county auditor if statutory provisions are closely followed. 209.

Membership in the New York Stock Exchange is a chose in ac-

tion which is taxable at the domicile of the owner, and a certificate of such membership is taxable in Ohio, when owned by a resident of this state. 465.

TIME—

Construction of the provision as to the time which must intervene before notice calling for bids for public work is complete; two consecutive weeks means two full weeks. 458.

TITLE—

Where devised subject to life estate, a fee simple title vests in the devisees at the death of the testator, subject to the said life estate. 85.

Marketable character of a title obtained at a sale in foreclosure. 89.

Prescriptive title acquired in street or alley by an abutting owner who takes possession and includes such street or alley within the boundaries of his land and exercises all the privileges of ownership for more than twenty-one years. 219.

TORRENS ACT—

See REGISTRATION OF LAND TITLES.

TORRENS LAW—

The Torrens law and the mechanics' lien law are not incompatible; the privilege granted by the latter of acquiring liens is restricted in its exercise by the Torrens law, which will be given effect as an exception to the mechanics' lien law. 33.

Title to registered land is not affected by inchoate mechanics' liens which do not appear on the certificate. 33.

TRESPASS—

Of a coal mine owner does not relieve an oil company from liability for permitting oil to escape into the coal mine. 58.

TRIAL—

The fact that argument of counsel to the jury was illogical does not render it prejudicial. 447.

Upon the granting of a motion for a new trial, judgment may be entered for plaintiff when the undisputed facts entitle him thereto. 455.

TRUST—

The engrafting of a trust upon an absolute deed may be shown by parol evidence, but the declaration of the trust must be contemporaneous with the deed. 359.

A trust may be impressed upon personal property by means of acts which would be entirely insufficient in the case of land. 359.

One appointed trustee of a going business for the purpose of continuing the business is personally liable for the purchase price of goods bought on his behalf and used in carrying on the business, in the absence of a stipulation relieving him from such liability. 441.

The relation of trust and confidence prevents a guardian acquiring title to property of his ward at a delinquent tax sale. 462.

Testimony which fails to establish agency must also fail to show a trust, since it necessarily follows that if no contract existed upon which agency could be established there could have been no trust agreement. 591.

VACATION—

Of an entry of satisfaction, see Judgments.

VENDOR AND PURCHASER—

A vendor's lien attaches only in case other security is not relied upon; acceptance of distinct and separate security amounts to a waiver of the equitable lien of the vendor. 365.

VENUE—

An action for personal injuries may be brought against an Ohio corporation in any county in the state in which service of summons can be made on a chief officer of the corporation. 375.

VERDICT—

Will not be set aside by a re-

viewing court because of the award of excessive damages, unless. 334.

Duty of the trial judge to direct a verdict for defendant, where plaintiff has offered no proof as to a material and necessary allegation. 437.

WAIVER—

Civil rights not waived by a colored man by accepting return of the money which he had paid for a meal and was then asked to eat in a back room where dishes were washed. 289.

WAREHOUSEMAN—

Taxability of chattel property in his custody. 209.

WARRANTY—

Refusal to admit evidence tending to establish an express warranty constitutes error, when. 276.

WATER WORKS—

See MUNICIPAL CORPORATIONS.

WIDOW—

Rights of the widow of a devisee of land who died without issue and whose death preceded that of the life tenant. 85.

Not an heir *per stirpes* of her deceased husband, when. 153.

Upon the death of a widow, intestate and without issue, personal property which came to her from her husband, who also died intestate, does not pass to the children of the said husband by a former marriage, but to her own brothers and sisters. 396.

WILLS—

Power conferred upon an executor and trustee to contract for the sale or lease of property is not affected by a contest of the will where the result is a judgment upholding the will; a lease with privilege of purchase may be made by a trustee having power to sell and invest. 17.

Life estate left to widow; proportionate share of each child

held to have vested at the death of the testator, subject to being divested as to any of said children in the event of his or her death before the death of the widow. 113.

Under the will in question a deed or will made by a child of the testator for his share in the estate, where made prior to the death of the widow holding a life estate, conveyed no title or interest in or to said share. 113.

Bequest to a son born of a woman pregnant at the time of the marriage of the testator to her is a sufficient acknowledgment to render said son legitimate. 113.

The verdict of a jury upholding a will which, as disclosed by the evidence, was not read to or by the testator or acknowledged by him and he had no knowledge of what it contained, is not sustained by the evidence and will be set aside. 142.

Undue influence is generally shown by circumstantial evidence. 142.

Under a bequest to the four sons of the testator, "or their heirs, *per stirpes*, the sum of \$1,100 absolutely," the widow of one of the sons, whose death without issue preceded that of the testator, does not take as the heir at law of the deceased son, but the said legacy lapses under the general law relative to wills and becomes the property of the residuary legatees. 153.

Life estate created in sons with estate in fee simple in grandchildren; invalidity of conveyance by grandson before title had accrued in him. 157.

Naked suspicion is not sufficient to overthrow a will. 177.

In an action to contest a will the scrivener may be called for cross-examination where he is the executor under the will and is made by the issues raised to appear as an adverse party. 177.

The presumption that the will was drawn in accordance with in-

structions by the testator is sufficient to overcome the objection that it was written on pieces of paper of different sizes and grade, where the explanation indicates that it was done innocently. 177.

Testimony as to declarations made by the testator before and after execution of the will may be competent on the question of testamentary capacity, but not where an issue of forgery has been raised. 177.

Instructions to the jury with reference to *prima facie* evidence, testamentary capacity, undue influence and fraud. 177.

Degree of proof required to establish fraud in a will case. 177.

It is not competent for jurors in a will case to substitute their own experience in life for sworn testimony. 177.

A provision that the remainder of testator's estate go to the heirs of himself and his wife to be divided equally share and share requires that the distribution be *per stirpes* and not *per capita*. 349.

Alternative clause of survivorship having become inoperative, the remainder held to have vested in the sons named, notwithstanding they were survived by the life tenant. 417.

A manifest intention to dispose of all property of which the testator died possessed held sufficient to include property inherited after execution of will. 423.

A devise in a will to a daughter "to be her full share and interest in all my estate" does not bar such devisee from her share of property not disposed of by the will; and rights so arising are not affected by the fact that the property in controversy had been disposed of by a legacy which had lapsed by reason of the death of the legatee in the lifetime of the testator. 423.

Participation in a lapsed estate can not be denied to one to whom a bequest was made in full of all her interest in the estate. 567.

The contents of a lost or spoli-

ated will may be established by the testimony of one witness. 584.

Where no evidence is offered in a will contest to show when the will was lost or destroyed, whether before or after the death of the testator, the order of probate will be accepted as sufficient evidence of its existence after the death of the testator to justify a verdict finding it to be his valid last will. 584.

No presumption that a lost will was destroyed by the testator *animo revocandi* arises, where the will was deposited in the probate court by the testator and was never called for by him and could not be found a few days after his death or at any time thereafter. 584.

WORDS AND PHRASES—

The word "children" as used in a policy of life insurance can not be so enlarged as to include grandchildren. 161.

Meaning of the word "immediate" as used in the policy of indemnity insurance with reference to giving notice to the company of the occurrence of an accident. 300.

WORKMEN'S COMPENSATION—

A judgment against the Industrial Commission in favor of the dependents of an injured workman will not be set aside on the ground that he died by his own act, where there is some evidence in support of the inference that the decedent was bereft of reason at the time of the suicidal act. 1.

Freedom from technical rules in the matter of awards to injured workman. 1.

Lead poisoning is not an occupational disease where contracted through the negligence of the employer. 221.

WRONGFUL DEATH—

There is no right of action for the benefit of the parents or next of kin, where the decedent was childless but left a wife surviving him, notwithstanding the wife died without an action having been brought for her benefit. 241.

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